No. 17-1471

IN THE
Supreme Court of the United States

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

GEORGE W. JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 23, 2018
CERTIORARI GRANTED SEPTEMBER 27, 2018

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Home Depot U.S.A., Inc. Reply Memorandum of Law in Further Support of Motion to Dismiss, Doc. 40 (W.D.N.C. Jan. 11, 2017) JA121

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Opinion of the District Court (W.D.N.C. 2017) 16a

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 17-1627

GEORGE W. JACKSON,
Third-Party Plaintiff – Appellee,

v.

HOME DEPOT U.S.A., INC.,
Third-Party Defendant – Appellant,

and

CAROLINA WATER SYSTEMS, INC.; CITIBANK, N.A.,
Defendants.

DOCKET ENTRIES

DATE	#	DOCKET TEXT
05/17/2017	1	Case docketed. Originating case number: 3:16-cv-00712-GCM. Case manager: KStump. [17-1627] KS [Entered: 05/17/2017 08:57 AM]
		* * *
06/26/2017	3	BRIEF by Appellant Home Depot U.S.A., Incorporated in electronic and paper format. Type of Brief: OPENING. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/26/2017. [1000107490] [17-1627] Antonio Lewis [Entered: 06/26/2017 05:18 PM]
06/26/2017	4	Joint FULL ELECTRONIC APPENDIX and full paper appendix by Appellant Home Depot U.S.A., Incorporated.

DATE	#	DOCKET TEXT
		Method of Filing Paper Copies: courier. Date paper copies mailed dispatched or delivered to court: 06/26/2017. [1000107499] [17-1627] Antonio Lewis [Entered: 06/26/2017 05:33 PM]
		* * *
07/26/2017	7	BRIEF by Appellee George W. Jackson in electronic and paper format. Type of Brief: RESPONSE. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/26/2017. [1000125908] [17-1627]--[Edited 07/26/2017 by MFT] Daniel Bryson [Entered: 07/26/2017 01:27 PM]
		* * *
08/10/2017	9	BRIEF by Appellant Home Depot U.S.A., Incorporated in electronic and paper format. Type of Brief: REPLY. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 08/09/2017. [1000134483] [17-1627] Antonio Lewis [Entered: 08/10/2017 10:55 AM]
		* * *
12/05/2017	18	ORAL ARGUMENT heard before the Honorable Paul V. Niemeyer, Dennis W. Shedd and Allyson K. Duncan. Attorneys arguing case: Mr. Sidney Stewart Haskins, II for Appellant Home Depot U.S.A.,

DATE	#	DOCKET TEXT
		Incorporated and David Kevin Lietz for Appellee George W. Jackson. Courtroom Deputy: Anisha Walker. [1000203580] [17-1627] AW [Entered: 12/05/2017 01:02 PM]
01/22/2018	19	PUBLISHED AUTHORED OPINION filed. Originating case number: 3:16-cv-00712-GCM [1000227214]. [17-1627] KS [Entered: 01/22/2018 11:48 AM]
01/22/2018	20	JUDGMENT ORDER filed. Disposition method: 17-1627 opn.p.arg. Decision: Affirmed. Originating case number: 3:16-cv-00712-GCM. Entered on Docket Date: 01/22/2018. [1000227219] Copies to all parties and the district court/agency. [17-1627] KS [Entered: 01/22/2018 11:51 AM]

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Docket No. 3:16-cv-00712-GCM

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

GEORGE W. JACKSON,
Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

DOCKET ENTRIES

DATE	#	DOCKET TEXT
10/12/2016	1	NOTICE OF REMOVAL with Jury Demand from General Court of Justice, District Court Division, Mecklenburg County, case number 16 CVD 10961. (Filing fee $ 400 receipt number 0419-3131490), filed by Home Depot U.S.A., Inc.. (Attachments: # 1 Exhibit A - Summons and Complaint, # 2 Exhibit B - Documents served on Home Depot U.S.A., Inc., # 3 Exhibit C - Citibank Dismissal, # 4 Cover Sheet Civil Cover Sheet)(Guidry, David) (Entered: 10/12/2016)

* * *

DATE	#	DOCKET TEXT
10/12/2016		ANSWER to Complaint contained in 1 Notice of Removal. THIRD PARTY COMPLAINT against Home Depot U.S.A., Inc., Carolina Water Systems, Inc. COUNTERCLAIM against Citibank, N.A. by George W Jackson. (Contained in State Court Pleadings - See Document No 1 Exhibit A) (tmg) (Entered: 10/14/2016)
		* * *
10/28/2016	11	MOTION to Compel Individual Arbitration, MOTION to Dismiss Jackson's Counterclaim or, in the Alternative, to Stay Proceedings as to Jackson's Counterclaim by Citibank, N.A.. Responses due by 11/17/2016 (Raynal, Charles) (Entered: 10/28/2016)
		* * *
10/28/2016	14	MOTION Realign the Parties by Home Depot U.S.A., Inc.. Responses due by 11/17/2016 (Attachments: # 1 Proposed Order)(Guidry, David) (Entered: 10/28/2016)
		* * *
10/28/2016	16	MOTION to Dismiss and Incorporated Memorandum of Law in Support Thereof by Carolina Water Systems, Inc.. Responses due by 11/17/2016 (Attachments: # 1 Exhibit 1 - Blum Decl. re: (A)

DATE	#	DOCKET TEXT
		Purchase Agreement) (Terpening, William) (Entered: 10/28/2016)
10/28/2016	17	MOTION to Dismiss in Favor of Arbitration by Home Depot U.S.A., Inc.. Responses due by 11/17/2016 (Guidry, David) (Entered: 10/28/2016)
		* * *
11/08/2016	23	MOTION to Remand by George W. Jackson. Responses due by 11/28/2016 (Attachments: # 1 Proposed Order, # 2 Certificate of Compliance)(Bryson, Daniel) (Entered: 11/08/2016)
		* * *
11/14/2016	27	MEMORANDUM in Opposition re 14 MOTION Realign the Parties by George W. Jackson. Replies due by 11/28/2016 (Attachments: # 1 Exhibit A - Citibank Notice of Vol Dismissal wo Prej)(Bryson, Daniel) (Entered: 11/14/2016)
		* * *
11/18/2016	30	Amended THIRD-PARTY COMPLAINT against Carolina Water Systems, Inc., Home Depot U.S.A., Inc., filed by George W. Jackson. (Attachments: # 1 Exhibit A - Home Improvement Agreement)(Bryson, Daniel) Modified text on 11/21/2016 (tmg). (Entered: 11/18/2016)

DATE	#	DOCKET TEXT
12/02/2016	31	ANSWER to 30 Counterclaim by Carolina Water Systems, Inc..(Terpening, William) (Entered: 12/02/2016)
12/02/2016	32	MOTION to Dismiss in Favor of Arbitration by Home Depot U.S.A., Inc.. Responses due by 12/16/2016 plus an additional 3 days if served by mail (Guidry, David) (Entered: 12/02/2016)
12/02/2016	33	MEMORANDUM in Support re 32 MOTION to Dismiss in Favor of Arbitration by Home Depot U.S.A., Inc.. (Guidry, David) (Entered: 12/02/2016)
12/14/2016	34	MEMORANDUM in Opposition re 16 MOTION to Dismiss and Incorporated Memorandum of Law in Support Thereof by George W. Jackson. Replies due by 12/21/2016 plus an additional 3 days if served by mail (Bryson, Daniel) (Entered: 12/14/2016)
12/14/2016	35	MEMORANDUM in Opposition re 32 MOTION to Dismiss in Favor of Arbitration by George W. Jackson. Replies due by 12/21/2016 plus an additional 3 days if served by mail (Bryson, Daniel) (Entered: 12/14/2016)
12/14/2016	36	RESPONSE to Motion re 23 MOTION to Remand by Home Depot U.S.A., Inc.. Replies due by 12/21/2016 plus an additional 3

DATE	#	DOCKET TEXT
		days if served by mail (Attachments: # 1 Exhibit A - Home Depot's Responses to Interrogatories, # 2 Exhibit B - John Blum Declaration)(Guidry, David) (Entered: 12/14/2016)
12/14/2016	37	REPLY to Response to Motion re 14 MOTION Realign the Parties by Home Depot U.S.A., Inc.. (Guidry, David) (Entered: 12/14/2016)
01/11/2017	38	REPLY to Response to Motion re 23 MOTION to Remand by George W. Jackson. (Attachments: # 1 Exhibit A - Bauer v. Home Depot)(Bryson, Daniel) (Entered: 01/11/2017)
01/11/2017	39	REPLY to Response to Motion re 16 MOTION to Dismiss and Incorporated Memorandum of Law in Support Thereof by Carolina Water Systems, Inc.. (Terpening, William) (Entered: 01/11/2017)
01/11/2017	40	REPLY to Response to Motion re 32 MOTION to Dismiss in Favor of Arbitration by Home Depot U.S.A., Inc.. (Attachments: # 1 Exhibit C - Plaintiff's First Request for Production of Documents to Home Depot)(Guidry, David) (Entered: 01/11/2017)

* * *

DATE	#	DOCKET TEXT
03/21/2017	44	**ORDER granting 23 Motion to Remand, and this case is remanded to the Superior Court of Mecklenburg County; denying without prejudice 32 Motion to Dismiss; denying without prejudice 11 Motion to Compel; denying without prejudice 11 Motion to Dismiss; denying 14 Motion Realign the Parties; denying without prejudice 16 Motion to Dismiss; denying without prejudice 17 Motion to Dismiss. Signed by Senior Judge Graham Mullen on 3/21/2017. (eef)** (Entered: 03/21/2017)
04/03/2017	47	4th Circuit NOTICE regarding: Filing of Home Depot U.S.A. Inc.'s Petition for Permission to Appeal, Part 1 of 4. (Attachments: # 1 Part 2 of 4, # 2 Part 3 of 4, # 3 Part 4 of 4, # 4 USCA Case Number [17-184] for Petition for Permission to Appeal, USCA Case Manager Karen Stump.) (ni) (Entered: 04/04/2017)
		* * *
05/22/2017	55	USCA Case Number 17-1627 re: 47 4th Circuit Notice of Home Depot U.S.A. Inc.'s Petition for Permission to Appeal. USCA Case

DATE	#	DOCKET TEXT
		Manager Karen Stump. (ni) (Entered: 05/22/2017)
		* * *
01/22/2018	58	4th Circuit ORDER granting Home Depot USA Inc's 47 Petition for Permission to Appeal. [17-184] (ni) (Entered: 01/22/2018)
		* * *
01/22/2018	60	Published Opinion from Fourth Circuit Court of Appeals as to 47 Petition for Permission to Appeal and 58 Order Granting Permission to Appeal. 4th Circuit decision - Affirmed. (Attachments: # 1 USCA Judgment) [17-1627] [17-184(L)] (ni) (Entered: 01/22/2018)
		* * *

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

16 CVD 10961

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

DOCKET ENTRIES

PLDG	TYPE	CLK DT	BY PARTY	AGAINST PARTY
COMP	ACCT	061716	CITIBANK NA	JACKSON, GEORGE W
CTCL	OTHR	082616	JACKSON, GEORGE W	CITIBANK NA
TPCL	DECL	082616	JACKSON, GEORGE W	HOME DEPOT USA INC CAROLINA WATER SYST
		* * *		
FILN	OTHR	101316	HOME DEPOT USA INC	
		* * *		

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

16 CVD 10961

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

COMPLAINT
(ACCT)

NOW COMES Plaintiff, complaining of the Defendant, alleges and says as follows:

PARTIES AND JURISDICTION

1. That Plaintiff is a national banking association organized pursuant to the Laws of the United States of America with its principal place of business in the State of South Dakota.

2. That Plaintiff is informed and believes and therefore alleges that Defendant is a citizen and resident of Mecklenburg County, North Carolina, and is of a legal age and under no legal disability.

3. This cause of action arises from a credit agreement between the Parties.

4. The District Court of MECKLENBURG County, North Carolina, has jurisdiction of the parties and the subject matter of this cause of action.

FIRST CLAIM FOR RELIEF

5. Paragraphs 1-4 are realleged and incorporated herein by reference.

6. That Defendant applied for, received, and use the The Home Depot credit card issued to the Defendant by either Plaintiff or its predecessor in interest.

7. Plaintiff is the current owner and holder of all right, title, and interest in the The Home Depot credit card account established for the Defendant.

8. The Defendant is currently indebted to the Plaintiff for charges made by the Defendant to the The Home Depot credit card account in the amount of $12,179.54 as shown by the statement of account attached hereto as "Exhibit A" and incorporated herein by reference.

9. Plaintiff has made demand upon the Defendant for payment of the outstanding balance, but the Defendant has failed and refused to pay the amount owed or any portion thereof.

10. Plaintiff is entitled to recover the amount of $12,179.54 from the Defendant.

SECOND CLAIM FOR RELIEF

11. Paragraphs 1 through 10 are realleged and incorporated by reference.

12. Pursuant to the terms and conditions of the credit card agreement, the Defendant agreed to pay the Plaintiff's reasonable attorney's fees in the event that the account was placed for collection. Pursuant to N.C.G.S. 6-21.2, the Plaintiff hereby gives notice to the Defendant that it intends to enforce those provisions of the account agreement calling for the payment of attorney fees. The Plaintiff hereby further notifies the

Defendant that said Defendant may avoid the imposition of attorney fees by paying the current outstanding balance to the undersigned at the address shown below within 30 days after the Defendant has been served with a copy of this Complaint and Summons. If the Defendant pays the current outstanding balance within 30 days after service, the Plaintiff will neither seek to enforce those provisions nor pursue further legal remedies against said Defendant.

13. The Plaintiff is entitled to recover from the Defendant its attorney's fees as provided by N.C.G.S. 6-21.2.

NOTICE

14. Unless you notify the undersigned within 30 days after receiving this notice that you dispute the validity of the debt or any portion thereof, the undersigned will assume this debt is valid. If you notify the undersigned in writing within 30 days of receiving this notice, the undersigned will obtain verification of the debt or obtain a copy of the Judgment (if one has been entered) and mail you a copy of such verification or Judgment. If you so request, in writing, within 30 days after receiving this notice, the undersigned will provide you with the name and address of the original creditor, if different from the current creditor. This Notice is sent in an attempt to collect a debt and any information obtained will be used for that purpose.

WHEREFORE, Plaintiff prays the Court as follows:

1. On its First Claim for Relief, that it have Judgment against Defendant in the principal amount of $12,179.54;

2. On its Second Claim for Relief, that it have and recover of the Defendant its reasonable attorney's fees as provided by N.C.G.S. 6-21.2;

3. That the costs of this action be taxed against the Defendant; and

4. For such other and further relief as to the Court seems just and proper.

This the 9 day of June, 2016.

* * *

127816

STATE OF NORTH CAROLINA

Mecklenburg County

WAKE COUNTY SHERIFF'S DEP

16CVD10861

In The General Court Of Justice
☒ District ☐ Superior Court Division

George W. Jackson, on behalf of himself and others similarly situated,

VERSUS

Home Depot, U.S.A., Inc. and Carolina Water Systems, Inc.

CIVIL SUMMONS
THIRD PARTY

☐ THIRD PARTY ALIAS AND PLURIES SUMMONS

G.S. 1A-1, Rules 3, 4, 14

IN OUT

TO:

Home Depot U.S.A., Inc.
c/o Corporation Service Company, Registered Agent
327 Hillsborough Street
Raleigh NC 27603

TO:

Carolina Water Systems, Inc.
c/o Mark A. Tebbe, Registered Agent
PO Box 1549
Liberty NC 27298

A civil action has been commenced and the defendant in that action claims that you are or may be liable to him/her for all or part of the plaintiff's claims against him/her!

You are notified to appear and answer the third party complaint of the defendant (third party plaintiff), as follows:

1. Serve a copy of your written answer to the third party complaint of the defendant (third party plaintiff) or his/her attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to him/her or by mailing it to his/her last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the third party complaint, then the defendant (third party plaintiff) will apply to the Court for the relief demanded in the third party complaint.

David K. Bryan
Whitfield Bryson & Mason LLP
900 W. Morgan Street
Raleigh NC 27603

8-26-16 2:34 ☐ PM

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

☐ ENDORSEMENT
This Third Party Summons was originally issued on the date indicated above and returned not served. At the request of the defendant (third party plaintiff), the time within which this Third Party Summons must be served is extended thirty (30) days.

☐ AM ☐ PM

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

AOC-CV-913M, Rev. 4/01
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WAKE COUNTY SHERIFF'S OFFICE

RETURN OF SERVICE

I certify that this Third Party Summons and a copy of the third party complaint were received and served as follows:

THIRD PARTY DEFENDANT 1

Date Received: 9/12/16 | Time Received: 1773 ☒ AM ☐ PM | Name of Individual, Company, Corporation, etc. to be served: HOMEDEPOT USA Inc C/O

☐ By delivering to the third party defendant named above a copy of this Third Party summons and the complaint; or

☐ By leaving a copy of this Third Party Summons and the third party complaint at the dwelling house or usual place of abode of the third party defendant named above with a person of suitable age and discretion then residing therein.

(A) As the third party defendant is a corporation, service was effected by delivering a copy of this Third Party Summons and third party complaint to the person named below.

Name and Address Of Person With Whom Copies Left (If corporation, give title of person copies left with)

Servd - Heather Hughes Agent at
320 Rodgers Dr Fl 603

☐ Other manner of service (specify)

☐ Third Party Defendant WAS NOT served for the following reason:

THIRD PARTY DEFENDANT 2

Date Received | Time Received ☐ AM ☐ PM | Name of Individual, Company, Corporation, etc. to be served

☐ By delivering to the third party defendant named above a copy of the Third Party Summons and third party complaint.

☐ By leaving a copy of this Third Party Summons and the third party complaint at the dwelling house or usual place of abode of the third party defendant named above with a person of suitable age and discretion then residing therein.

☐ As the third party defendant is a corporation, service was effected by delivering a copy of the Third Party Summons and third party complaint to the person named below.

Name and Address Of Person With Whom Copies Left (If corporation, give title of person copies left with)

☐ Other manner of service (specify)

☐ Defendant WAS NOT served for the following reason:

Service Fee: $ | Signature Of Server: 6301

Date Received: SEP 07 2016 | Name Of Server If Not Sheriff Or Deputy: DONNIE HARRISON, SHERIFF

Date Of Return: 9/12/16 | Company: WPD

AOC-CV-913M, Rev. Two, Rev. 4/01
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GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
NORTH CAROLINA
MECKLENBURG COUNTY

16 CVD 10961

CITIBANK, N.A.,
Plaintiff/Counter-Defendant,

v.

GEORGE W. JACKSON, on behalf of himself and others similarly situated,
Defendant/Counter-Plaintiff.

GEORGE W. JACKSON, on behalf of himself and others similarly situated,
Counter-Plaintiff and Third-Party Plaintiff,

v.

HOME DEPOT, U.S.A., INC. AND CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIM AND THIRD-PARTY CLASS ACTION CLAIMS

JURY TRIAL DEMANDED
INJUNCTIVE RELIEF SOUGHT

ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIM AND THIRD-PARTY CLASS ACTION CLAIMS

Defendant, George W. Jackson ("JACKSON"), by and through the undersigned counsel, files this Answer, Affirmative Defenses, and Counterclaim against CITIBANK, N.A. ("CITIBANK") and brings class action third-party claims against third-party defendants

HOME DEPOT, U.S.A., INC. ("HOME DEPOT") and CAROLINA WATER SYSTEMS, INC. ("CWS" and together with CITIBANK and HOME DEPOT, "Counterclaim and Third-Party Defendants"), as follows:

GENERAL DENIAL AND ANSWER

JACKSON generally denies each and every allegation in the Complaint that requires a response except those items specifically admitted herein. JACKSON responds to each allegation of the Complaint as follows, with numbered paragraphs corresponding to those of the Complaint.

ANSWER

1. Without knowledge, therefore Denied.

2. Admitted that JACKSON is a citizen and resident of Mecklenburg County, North Carolina, and is of a legal age and under no legal disability. Without knowledge as to CITIBANK'S beliefs.

3. Admitted for jurisdictional purposes only, otherwise Denied.

4. Admitted.

5. To the extent this paragraph requires a response, JACKSON incorporates his responses to paragraphs 1 through 4 above.

6. Admitted that as part of the sale of JACKSON's water treatment system, the sales representative arranged for financing through HOME DEPOT card services. However, in conjunction with the financing JACKSON was promised that his water treatment system would be free if he referred six customers.

7. Without knowledge, therefore denied. JACKSON demands strict proof that CITIBANK is the current owner and holder of the account at issue.

8. Denied.

9. Admitted that CITIBANK has made demand for payment, otherwise Denied.

10. Denied.

11. To the extent this paragraph requires a response, JACKSON incorporates his responses to paragraphs 1 through 10 above.

12. Denied.

13. Denied.

14. Paragraph 14 does not require a response since it is a debt collection notice provided by CITIBANK.

15. Prayer for Relief – JACKSON denies and objects to all relief sought by CITIBANK.

AFFIRMATIVE DEFENSES

1. **STANDING** – CITIBANK is barred from recovering the relief it requests since the transaction at issue is null and void pursuant to N.C. Gen. Stat. § 25A-37. Further, the Complaint fails to adequately demonstrate or incorporate the chain of title evidencing that CITIBANK is in fact the real party in interest with proper standing to bring this action.

2. **FAILURE TO STATE A CAUSE OF ACTION** – CITIBANK's claims are barred because CITIBANK has failed to satisfy the conditions precedent to stating a cause of action under the claims asserted in the Complaint, including but not limited to failure to attach any agreement it has with JACKSON, and

failure to attach any documents showing that it is the true holder of JACKSON's alleged debt.

3. **VIOLATION OF THE TRUTH IN LENDING ACT ("TILA")** – CITIBANK's claims are barred in whole or in part by the Truth in Lending Act violations that occurred at the time of the sale and financing of the water treatment system at issue. CITIBANK and its predecessors in interest failed to give JACKSON the required disclosures regarding the financing terms. For example, JACKSON did not have the opportunity to cancel the said transaction since the equipment was installed in his home on July 25, 2014, and JACKSON did not receive disclosure of the financing terms until over ten (10) days later, and even when he did receive the financing terms, they were incomplete.

4. **FRAUD** – CITIBANK's claims are barred in whole or in part by the fraud perpetrated by CITIBANK and its predecessors in interest. During the sale of JACKSON's water treatment system, JACKSON was told that he would receive his system for free after he referred six customers, in violation of North Carolina law. In addition, JACKSON was promised that he would receive promotional financing of 0% and an affordable payment that would allow him to pay off his loan, both of which were untrue. JACKSON was also subjected to numerous false representations regarding the condition of his water, special promotions and the necessity of the water treatment system, which JACKSON relied on when making the decision to purchase the product. As a result of CITIBANK's and its predecessors' fraud, including by operation of the Holder Rule, CITIBANK's claims are barred.

5. **UNCLEAN HANDS** – CITIBANK's claims are barred by the doctrine of unclean hands, because the acts alleged herein were knowing and intentional, and bar CITIBANK's recovery under any theory of relief, including relief under a purported account which was subject to a sale in violation of N.C. Gen. Stat. § 25A-37.

6. **RESERVATION OF RIGHTS** – JACKSON reserves the right to supplement these affirmative defenses as additional information becomes available through discovery.

7. **DEMAND FOR TRIAL BY JURY** – JACKSON hereby demands a trial by jury on all matters so triable as of right.

COUNTERCLAIM AND CLASS ACTION THIRD-PARTY CLAIMS

Counter-Plaintiff and Third-Party Plaintiff JACKSON, on behalf of himself and all others similarly situated, brings claims against the Counterclaim and Third-Party Defendants, as follows:

I. INTRODUCTION

1. This is a consumer class action seeking to remedy HOME DEPOT and CWS's unfair and deceptive practices, as well as violations of other state laws. JACKSON and putative class members were sold water treatment systems by HOME DEPOT and CWS.

2. During its sale presentations, HOME DEPOT and CWS regularly and systematically utilize a referral program to entice customers that the costs of their water treatment systems will be fully or partially offset by the direct referral of other customers. HOME DEPOT and CWS uniformly represent to its customers

who purchase water treatment systems that if they agree to refer potential purchasing customers, the person making the referrals will be given the water treatment system for free, will receive referral checks to be applied to the balance of their loan, or receive other consideration.

3. In JACKSON's case, he was told that if he referred six individuals, he would receive his system for free. JACKSON made referrals based on this representation and received referral money that was to be applied to his loan. However, neither HOME DEPOT nor CWS gave JACKSON the water treatment system for free as promised based on the referral program. The referral program offered to JACKSON as enticement to buy a water treatment system from HOME DEPOT and CWS violates North Carolina's Referral Sales Statute (N.C. Gen. Stat. § 25A-37).

4. As a result, JACKSON purportedly owes over $12,000 on a water system that originally cost around $9,000, but that was supposed to be free. According to the onerous financing terms, it will take JACKSON 24 years, and $31,000 to pay off the loan. To make matters worse, CITIBANK has sued JACKSON for failure to pay on the loan despite the fact that the transaction was based on an unlawful referral program and deceptive and unfair sales tactics.

5. Accordingly, the Counterclaim and Third-Party Defendants' conduct violates North Carolina's referral sales' statute, N.C. Gen. Stat. § 25A-37, and North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 et seq. ("UDTPA").

II. JURSIDICTION AND VENUE

6. This Court has jurisdiction over the claims alleged herein against the Counterclaim and Third-Party Defendants in that at all times relevant to the events and transactions alleged herein, the Counterclaim and Third-Party Defendants solicited, marketed, financed and sold water treatment systems to persons in this State, collected payments from persons in this State at the Counterclaim and Third-Party Defendants' order or direction, and otherwise acted in a manner to mitigate any due process concerns.

7. Venue is proper in this county since the acts alleged herein occurred in Mecklenburg County, North Carolina.

III. PARTIES

8. JACKSON is a natural person and resident of Mecklenburg County, North Carolina.

9. CITIBANK is a New York Corporation headquartered in Sioux Falls, South Dakota. CITIBANK does business in Mecklenburg County, and throughout the state of North Carolina.

10. HOME DEPOT is a Delaware corporation with its principal place of business at 2455 Paces Ferry Road, Atlanta, Georgia 30339. HOME DEPOT does business in Mecklenburg County, and throughout the state of North Carolina, with a North Carolina registered mailing address of 327 Hillsborough Street, Raleigh, North Carolina 27603.

11. CWS is a North Carolina corporation with its principal place of business at 211a E. Dameron Ave., Liberty, North Carolina 27298. CWS does business in

Mecklenburg County, and throughout the state of North Carolina.

12. Upon information and belief, HOME DEPOT and CWS have entered into an agreement whereby CWS has agreed to sell water treatment systems as a HOME DEPOT representative, installation professional and/or agent. At all relevant times, HOME DEPOT and CWS solicited, distributed and sold water treatment systems to individuals in North Carolina using an unlawful systematic referral program as discussed in more detail below.

IV. FACTUAL ALLEGATIONS

13. Sometime in July 2014, the HOME DEPOT and CWS's sales representative called JACKSON for the purposes of soliciting and selling a water treatment system to him. The sales representative was notified of JACKSON's contact information by a friend of JACKSON who purchased a water treatment system, and who was taking part in HOME DEPOT and CWS's referral program.

14. Within the initial phone call, the HOME DEPOT and CWS's sales representative stated that he recently tested a friend's water and that there were "coal ash" problems and cancer-causing agents found in the tap water. The sales representative stated that because of this, JACKSON'S friend purchased a water treatment system to eliminate the problem. Within this initial phone call, the sales representative set up an appointment to come by JACKSON's home for the purpose of testing his water.

15. On or about July 24, 2014, HOME DEPOT and CWS's sales representative showed up at JACKSON's house for the purpose of conducting a water

test. However, the simple water "test" was in fact a full sales presentation, which included props and a sales pitch, and lasted over three hours.

16. During the sales presentation, the sales representative conducted a few water tests, including one test that required the use of vials of JACKSON's tap water from the faucet and the dropping of liquids into each vial. The sales representative indicated to JACKSON that he needed to protect himself because his water was unsafe and that there were cancer-causing agents in the water.

17. In addition, the sales representative showed JACKSON various documents, charts and graphs which represented information that mislead JACKSON into believing his tap water was harmful to his health.

18. After listening to hours of the sales presentation, JACKSON asked how much the water system cost. After the sales representative indicated that it was $8,900, JACKSON indicated that he could not afford the product. However, the sales representative represented that JACKSON could receive the product for free if he referred six customers who purchased a water system. He also stated that JACKSON's friend was taking part in the program and that he could receive checks of $200 for each referral who bought a water system and $100 for each referral who simply listened to the sales presentation. In addition, the sales representative informed JACKSON that he would qualify for financing through HOME DEPOT which offered 0% interest for 24 months, with payments of only $80 per month, plus a HOME DEPOT gift card of $20.

19. Further, HOME DEPOT and CWS's sales representative stated that if JACKSON purchased the water treatment system that day, he would qualify for a promotion whereby he didn't have to pay sales tax. Upon information and belief, customers were not required to pay sales tax on the water treatment systems sold by HOME DEPOT and CWS.

20. Based on the representations made about the poor quality of his home tap water, and the vastly improved quality of the water from the HOME DEPOT and CWS water treatment system, along with the promise that the system would be free after six referrals bought a water system and monetary incentives for making referrals, plus free soap and cleaning products, and the low interest rates available for financing, JACKSON decided to purchase HOME DEPOT and CWS's water treatment system that day.

21. HOME DEPOT and CWS's representative informed JACKSON that he qualified for financing through HOME DEPOT's card services, but that as long as he provided 6 referrals who bought a water system, JACKSON would not be required to pay for the water treatment system.

22. The water treatment system was installed at JACKSON's home the next day on July 25, 2014, and before JACKSON's three-day right to cancel had expired. However, HOME DEPOT and CWS did not present JACKSON with the terms of his purchase until at least August 6, 2014 when he signed the Home Improvement Agreement ("HIA") with HOME DEPOT. A true and correct copy of the HIA is attached as **Exhibit A**.

23. At all relevant times, CWS was acting as an authorized representative and agent of HOME DEPOT.

24. The HIA and JACKSON's purchase was financed through HOME DEPOT either directly through CITIBANK, or by subsequent assignment.

25. Soon after his purchase, JACKSON began referring customers to HOME DEPOT and CWS in order to satisfy the referral program. JACKSON used the forms given by HOME DEPOT and CWS in referring his friends and neighbors. JACKSON received at least one check from the Counterclaim and Third-Party Defendants in the amount of $100 based on one of his successful referrals.

26. However, despite the HOME DEPOT and CWS representative's reassurances and promises, JACKSON did not receive his water treatment system free of charge.

27. To make matters worse, after the first year, JACKSON'S interest rate jumped to 25.99% despite the sales representative's assurances that he would have 0% interest for 24 months. As part of the interest rate increase, back interest in the amount of approximately $400 was charged to JACKSON.

28. JACKSON is now stuck with a 25.99% interest rate and a balance of over $12,000 for a product with a retail price of $1,500 or less. According to the current financing terms, it would take JACKSON 24 years, and $31,000 to pay off the purchase of the water treatment system.

29. JACKSON has made several attempts to cancel the transaction and tender his equipment back to the Counterclaim and Third-Party Defendants and

their representatives based on the various misrepresentations made by HOME DEPOT and CWS, but was not allowed to.

30. As a result, JACKSON has been sued by CITIBANK for amounts purportedly owed in excess of $12,000 as it relates to the sale of the water treatment system at issue.

V. ALLEGATIONS COMMON TO THE CLASS

31. CWS is an authorized representative and agent of HOME DEPOT and routinely enters into contracts on behalf of HOME DEPOT through the use of Home Improvement Agreements such as the one used in the JACKSON transaction and attached as Exhibit A.

32. HOME DEPOT and CWS use a well-planned marketing scheme designed to help them avoid certain laws related to telephone solicitation and home improvement sales. HOME DEPOT and CWS knowingly and willfully target new homeowners and other customers using a referral based system, whereby customers refer their friends with the promise that a certain number of referrals will allow the customer to get the water treatment system for free. This gives HOME DEPOT and CWS a constant source of sales leads while enticing customers to purchase the product under the guise that it will be free.

33. At all relevant times, HOME DEPOT and CWS regularly and systematically used an unlawful referral program to entice customers into purchasing the water treatment equipment under the customers' mistaken belief that the cost of the water treatment system would be fully or partially offset based on the referral of other customers.

34. Some customers are approached by HOME DEPOT and CWS when they shop at HOME DEPOT using standardized communications and "water test kits," while others are contacted after a neighbor or a friend refers them. All customers are offered to take part in the HOME DEPOT referral system.

35. To help arrange sales demonstrations, HOME DEPOT and CWS routinely and systematically offer a free test of the consumer's tap water.

36. Instead of a brief water test, when HOME DEPOT and CWS gain access to a homeowner's residence, a well-structured, standardized sales pitch occurs that is uniform in virtually every case, and which often lasts three hours or longer. HOME DEPOT and CWS employ a scripted presentation that employees and representatives are required to memorize and to follow in every home solicitation sales pitch. The scripted pitch does include a water "test," which is designed to frighten and deceive the average homeowners, and to cause concern over the safety of the homeowner's tap water.

37. The water "tests" employed by HOME DEPOT and CWS involves the taking of vials of the tap water and adding, unidentified chemical drops. In reality, this precipitant test only measures the hardness of the water and not whether it's harmful or contains contaminants. This test is used to improperly infer that the tap water contains pollution, harmful chemicals, and other cancer-causing carcinogens.

38. HOME DEPOT and CWS's water test scheme is so notorious that multiple states have specifically warned consumers to avoid being duped by it.[1]

39. The purpose of HOME DEPOT and CWS's deceptive sales pitch and demonstration is to coerce the homeowner into buying the water softener on the spot. Upon information and belief, HOME DEPOT and CWS pay $800-$1,000 for the water softeners at issue which are sold for $8,990 to customers. The same type of water softener can be purchased from many retailers for less than $1,400.

40. To further coerce reluctant homeowners to buy their excessively overpriced water softener and to provide for additional leads and sales opportunities, HOME DEPOT and CWS use a referral program in their sales, which represents that their water system will effectively be free or at a reduced cost to the consumer if they refer a certain number of customers.

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[1] For example, the state of Florida Attorney General's website states:

> **"How to Protect Yourself: Water Treatment Devices: Avoid "Free" home water tests**
>
> Fraudulent sellers that advertise "free home water testing" may only be interested in selling you their water treatment device, whether you need it, or not. In performing the test, the salesperson may add tablets or droplets of chemicals to your tap water, explaining that the water will change color or that particles will form if the water is contaminated. When the water changes color before your eyes, the salesperson may warn you that the water is polluted and may cause cancer. In almost all of these cases, any water (even spring water) would "fail" the company's test."

(http://myfloridalegal.com/pages.nsf/main/3d0fd1650fc920c485256cc900698282!OpenDocument.)

41. Once a homeowner has agreed to purchase and finance a water softener, the HOME DEPOT and CWS arrange for installation of the water softener within twenty-four hours of the sale. This quick turn-around from sale to installation accomplishes several important goals for HOME DEPOT and CWS. First, it is much more difficult for a homeowner to change his mind if the equipment has been installed. Cancellation rates are significantly reduced in this manner. Second, HOME DEPOT and CWS routinely do not bring the homeowner's finance contract until at least three days after the initial sale occurs.

42. When the finance contract is presented by HOME DEPOT and CWS, many homeowners discover for the first time that they will actually be paying an exorbitant rate of interest, as high as 25.99%. Homeowners are unable to cancel the sale because their three-day right to cancel the transaction has expired. This leaves most homeowners with no option but to sign the finance contract.

43. Many homeowners, however, never even see that the interest rate is much higher than they were promised, until they receive their first monthly statement. HOME DEPOT'S HIA, at the time of JACKSON's purchase, did not disclose the interest rate that would apply.

44. Despite the fact that HOME DEPOT and CWS's referral program and tests constitute unfair and deceptive trade practices, HOME DEPOT and CWS continue to uniformly represent this information to customers because their entire business model is based on the referral program and fear tactics regarding the condition of their tap water.

VI. CLASS ACTION ALLEGATIONS

45. Pursuant to Rule 23 of the Rules of Civil Procedure (N.C. G.S. § lA-1, Rule 23), JACKSON brings this action for himself and on behalf of all other persons similarly situated.

46. The Class(es) sought to be certified are defined as follows:

> **HOME DEPOT CLASS:** All persons in the state of North Carolina that entered into a Home Improvement Agreement with Home Depot for "water treatment" equipment substantially similar to Exhibit A, during the Class Period.
>
> **CWS CLASS:** All persons in the state of North Carolina that purchased a Water Treatment System from Carolina Water Systems, Inc., during the Class Period.

47. The Class Period for each claim begins four years prior to the filing of the claims asserted herein and ends when notice certifying the Class(es) is ordered by the Court.

48. JACKSON is unable to state the exact number of members of the Class(es) because that information is solely in the possession of the Counterclaim and Third-Party Defendants. However, JACKSON believes that the putative Class(es) exceed several hundred customers and is therefore so numerous that joinder of all members would be impracticable.

49. Questions of law or fact common to the Class(es) exist and predominate over questions affect-

ing only individual members, including, *inter alia*, the following:

(a) Whether HOME DEPOT and CWS's selling of water treatment systems using a referral system violates the North Carolina's Referral Sales statute and/or G.S. § 75-1.1;

(b) Whether HOME DEPOT and CWS's use of the unlawful referral program constitutes an unfair and deceptive trade practices in violation of G.S. § 75-1.1; and

(c) Whether HOME DEPOT and CWS's standardized testing procedure constitutes an unfair and deceptive trade practice in violation of G.S. § 75-1.1

50. The claims asserted by JACKSON in this action are typical of the claims of the members of the Class(es) as defined above because HOME DEPOT and CWS use standardized referral programs, scripts, and contracts. The claims in this action arise from the uniform course of conduct by HOME DEPOT and CWS in the unlawful sale of $9,000 water treatment systems to Class members based on an illegal referral program and based upon a false and misleading water test. Because HOME DEPOT and CWS routinely solicit customers based on a uniform referral sales program, JACKSON's claims are typical of the Class(es) he seeks to represent.

51. JACKSON will fairly and adequately represent and protect the interests of the members of the Class(es) because he has no interest antagonistic to the Class(es) he seeks to represent, and because the adjudication of his claims will necessarily decide the identical issue for other class members. There is nothing peculiar about JACKSON's transaction that would

make him inadequate as class representative. JACKSON has retained counsel competent and experienced in both consumer protection and class action litigation.

52. A class action is superior to other methods for the fair and efficient adjudication of this controversy because the economic damages suffered by each individual class member will be relatively modest, compared to the expense and burden of individual litigation. It would be impracticable for each class member to seek redress individually for the wrongful conduct alleged herein because the cost of such individual litigation would be cost prohibitive. It would be difficult, if not impossible, to obtain counsel to represent JACKSON and other class members on an individual basis for such small claims. More importantly, the vast majority of class members are not aware that the referral scheme and contracts used by HOME DEPOT and CWS violate the UDTPA and other state laws, and a class action is the only viable means of adjudicating their rights. There will be no difficulty in the management of this litigation as a class action, as the legal issues affect a standardized pattern of conduct by HOME DEPOT and CWS.

53. HOME DEPOT and CWS also acted and refused to act on grounds generally applicable to the Class(es), thereby making appropriate declaratory relief and corresponding final injunctive relief with respect to the Class(es) as a whole. HOME DEPOT and CWS should be enjoined from the conduct alleged herein.

COUNT I
VIOLATION OF REFERRAL SALES STATUTE
BY HOME DEPOT AND CWS

54. JACKSON re-alleges paragraphs 1 through 53 above as if set forth fully in this Count.

55. Third Party Defendants HOME DEPOT and CWS advertise, solicit and sell water treatment systems and other personal goods and services through home solicitation and referral sales. HOME DEPOT and CWS knowingly and willfully solicit and sell their water treatment systems by offering free products and/or compensation to potential customers who agree to refer other purchasing customers to HOME DEPOT and CWS.

56. JACKSON and Class members were solicited by HOME DEPOT and CWS at their homes, and purchased water treatment systems after HOME DEPOT and CWS represented that the purchase price of the water treatment systems would be reimbursed after they referred other individuals to listen to HOME DEPOT and CWS's sales demonstrations, and that they would receive referral checks for successful referrals.

57. North Carolina's Referral Sales statute states:

> The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) **at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful**. Any obligation of a buyer aris-

> ing under such a sale shall be void and a nullity and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale.

G.S. § 25A-37 (emphasis added).

58. A "referral sale" is a transaction in which a person is induced to purchase goods or service upon the representation that the purchaser can reduce or recover the purchase price, or earn a commission or other consideration, by referring other prospective buyers to the seller for similar purchases.

59. Here, JACKSON and class members purchased a water treatment system from HOME DEPOT and CWS that included payments and other consideration based upon the procurement of prospective customers in violation of G.S. § 25A-37.

60. Exhibit A is a HOME DEPOT contract for JACKSON's transaction which specifically references the referral program

61. JACKSON's and class members' contracts and sales constitute an unlawful referral sale in violation of G.S. § 25A-37.

62. As a result, JACKSON and class members are entitled to a declaration that their obligations under the agreement are void and a nullity, damages (including but not limited to consideration paid), injunctive relief, and attorney's fees and costs as allowable under the Referral Sales Statute, and the agreements at issue.

COUNT II
VIOLATION OF NORTH CAROLINA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT BY HOME DEPOT AND CWS

63. JACKSON re-alleges paragraphs 1 through 62 above as if set forth fully in this Count.

64. G.S. § 75-1.1 states that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

65. The purpose of G.S. § 75-1.1 was "to encourage enforcement of the act by private individuals injured by unfair trade practices."

66. HOME DEPOT and CWS's soliciting, financing, and selling of water treatment systems through home solicitations and referral sales constitutes "commerce" as defined by G.S. §75-1.1.

67. HOME DEPOT and CWS's violation of the Referral Sales statute constitutes a *per se* violation of G.S. § 75-1.1 (see G.S. § 25A-44(4)).

68. Moreover, HOME DEPOT and CWS violated G.S. § 75-1.1 by, inter alia, engaging in the following unfair and deceptive trade practices:

a. Performing precipitant tests on customers' tap water;

b. Uniformly failing to present customers with financing terms until after the equipment has been installed in the home;

c. Circumventing the customers' three-day right to cancel by installing the equipment the next day and before financing terms are disclosed; and

d. In other ways to be shown at trial.

69. As a proximate result of HOME DEPOT and CWS's unfair and deceptive conduct, JACKSON and class members have been harmed.

70. JACKSON and class members are entitled to restitution and treble damages pursuant to G.S. § 75-16, as a remedy to HOME DEPOT and CWS's continuing pattern and practice of unfair and deceptive trade practices.

71. JACKSON and class members are also entitled to injunctive relief, and attorney's fees and costs pursuant to G.S. § 75-16.1.

COUNT III
HOLDER RULE LIABILITY AGAINST CITIBANK
(INDIVIDUAL CLAIM ONLY)

72. JACKSON re-alleges paragraphs 1 through 71 above as if set forth fully in this Count.

73. JACKSON asserts this claim on an individual basis only and not on behalf of any class.

74. Pursuant to G.S. § 25A-25 and the HIA at Exhibit A, in a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument of indebtedness any claims or defenses available against the original seller.

75. CITIBANK is subject to all claims and defenses that JACKSON has against HOME DEPOT and CWS for the unfair and deceptive manner in which the water treatment system at issue was sold, including the representation that the system would be free after six referrals. Therefore, CITIBANK is jointly and severally liable to JACKSON, who financed the purchase of his water treatment system through

HOME DEPOT, which directly sold or assigned the transaction to CITIBANK.

76. JACKSON's obligations under the sale are null and void, and he is entitled to recover all amounts paid to CITIBANK.

77. JACKSON is also entitled to all relief available against CITIBANK, including attorney's fees and costs, pursuant to HOME DEPOT and CWS's violations of G.S. § 75-1.1.

PRAYER FOR RELIEF

WHEREFORE, JACKSON, individually and on behalf of all others similarly situated, prays for a judgement against the Counterclaim and Third-Party Defendants, as follows:

a) For an order certifying the Class(es), pursuant to Rule 23 of the North Carolina Rules of Civil Procedure as provided in N.C. Gen. Stat. § 1 A-1;

b) For an order appointing JACKSON as representative of the Class(es), and appointing the law firms representing JACKSON as counsel for the Class(es);

c) Enter all appropriate orders, for discovery and otherwise, consistent therewith; and

d) Enjoin the Counterclaim and Third-Party Defendants from further violations of N.C. G.S. § 25A-37 and § 75-1.1.

DEMAND FOR A JURY TRIAL

JACKSON, on behalf of himself and all others similarly situated, hereby demands a trial by jury.

Dated: August 26, 2016

* * *

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
NORTH CAROLINA
MECKLENBURG COUNTY

16 CVD 10961

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

GEORGE W. JACKSON,
Third-Party Plaintiff,

v.

HOME DEPOT, U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

CITIBANK, N.A. NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure, Plaintiff Citibank, N.A. hereby gives notice of dismissal without prejudice of the claims that Plaintiff Citibank, N.A. has asserted against George W. Jackson in this action. As to the claims asserted by Plaintiff Citibank, N.A. against George W. Jackson, each party shall bear its own attorneys' fees and costs.

This the 23rd day of September, 2016.

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil No. 3:16-cv-00712-GCM

Case No. 16 CVD 10961, Removed from
the General Court of Justice, District Court Division,
Mecklenburg County, North Carolina

CITIBANK, N.A.,
Plaintiff/Counter-Defendant,

v.

GEORGE W. JACKSON, on behalf of himself
and others similarly situated,
Defendant/Counter-Plaintiff.

GEORGE W. JACKSON, on behalf of himself
and others similarly situated,
Counter-Plaintiff and Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC., AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

NOTICE OF REMOVAL

Third-Party Defendant Home Depot U.S.A., Inc. ("Home Depot") hereby files this Notice of Removal of this action from the General Court of Justice, District Court Division, Mecklenburg County, North Carolina, to the United States District Court for the Western District of North Carolina. This Notice of Removal is filed pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453 on the basis of the following facts, which show that this case may be removed to this Court:

1. Home Depot has been sued in a civil action entitled *Citibank, N.A. v. George W. Jackson, on behalf*

of himself and others similarly situated, Case No. 16 CVD 10961, in the General Court of Justice, District Court Division, Mecklenburg County, North Carolina (the "State Court Action").

2. Counter-Plaintiff George W. Jackson ("Jackson") filed his Answer, Affirmative Defenses, Counterclaim and Third-Party Class Action Claims (the "Complaint"), naming Home Depot as a counterclaim defendant for the first time, on August 26, 2016. In addition to Home Depot, the Complaint names as Counter-Defendant Citibank, N.A. ("Citibank") and Third-Party Defendant Carolina Water Systems, Inc. ("CWS," and, together with Home Depot and Citibank, "Counter-Defendants"). Home Depot and CWS were previously not parties in this case.

3. As set forth more fully below, this case may be removed to this Court pursuant to 28 U.S.C. §§ 1441 and 1453 because Home Depot has satisfied the procedural requirements for removal, and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d).

I. HOME DEPOT HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.

4. Jackson purported to serve Home Depot with the Complaint on September 12, 2016. (*See* Exhibit A.) Accordingly, this Notice of Removal is timely under 28 U.S.C. § 1446(b) because it was filed within thirty days after receipt by Home Depot, through service or otherwise, of a copy of the "initial pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b).

5. As of the date of this removal, Home Depot has not filed a responsive pleading to the Complaint. Home Depot reserves all rights to assert any and all defenses or otherwise respond to the Complaint. Home Depot further reserves the right to amend or supplement this Notice of Removal.

6. Venue lies in the United States District Court for the Western District of North Carolina, pursuant to 28 U.S.C. § 1441(a), because the original action was filed in a state court located within the Western District of North Carolina. Venue, therefore, is proper in this Court because it is the "district and division embracing the place where such action is pending." *See* 28 U.S.C. § 1441(a).

7. Pursuant to 28 U.S.C. § 1446(a), true and exact copies of the Summons and Complaint served on Home Depot are attached as Exhibit A, and all other process, pleadings, and orders served on Home Depot in this matter are attached as Exhibit B. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for Jackson, and a copy is being filed with the clerk of the General Court of Justice, District Court Division, Mecklenburg County, North Carolina.

8. On September 23, 2016, Citibank, the sole original plaintiff, voluntarily dismissed its claim against Jackson. Citibank's Notice of Voluntary Dismissal Without Prejudice is attached hereto as Exhibit C. As a result, the only claim that is now pending is Jackson's putative class action against Home Depot, CWS, and Citibank, making Jackson the only plaintiff in the case. Accordingly, a motion for realignment, to identify Jackson as Plaintiff and Home Depot, CWS,

and Citibank as Defendants, will be filed with the Court.

9. Home Depot has never been a plaintiff in the State Court Action. Because Home Depot was brought into this case for the first time as a third-party counterclaim defendant, and because Jackson is now the only plaintiff in this case, Home Depot is a defendant who may properly remove the case under 28 U.S.C. §§ 1441 and 1453.[1]

II. REMOVAL IS PROPER BECAUSE THE COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332.

10. The Court has original jurisdiction over this action, and the action may be removed to this Court, under the Class Action Fairness Act of 2005 ("CAFA"). Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28).

11. As set forth below, this is a putative class action in which: (1) there are more than 100 members in the putative class proposed by Jackson; (2) at least one

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[1] *Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008), which interpreted CAFA removal not to apply to counterclaim or third-party defendants, does not control the outcome here for two reasons. First, the Supreme Court's recent decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014), undercuts the reasoning of the *Palisades* majority. *See, e.g., Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 912 (11th Cir. 2014) (*Dart Cherokee* "overrule[d]" prior decisions applying "any presumption in favor of remand" to CAFA). Second, in *Palisades*, there was no dismissal of the original claim, and no realignment—the original plaintiffs in that case remained plaintiffs. That is not true here, where Jackson is now the only plaintiff.

member of the proposed class is a citizen of a different state than at least one Counter-Defendant; and (3) based upon the allegations in the Complaint, the claims of the putative class members exceed the sum or value of $5 million in the aggregate, exclusive of interest and costs. Thus, this Court has original jurisdiction over this action, and the action may be removed to this Court pursuant to 28 U.S.C. § 1332(d)(2).

A. The Proposed Class Consists of More Than 100 Members.

12. Jackson purports to bring this case as a class action on behalf of two classes: (1) "[a]ll persons in the state of North Carolina that entered into a Home Improvement Agreement with Home Depot for 'water treatment' equipment substantially similar to [the one attached to the Complaint as an exhibit]" during the four years prior to the filing of the Complaint, and (2) "[a]ll persons in the state of North Carolina that purchased a Water Treatment system from Carolina Water Systems, Inc." during the four years prior to the filing of the Complaint. (Compl. ¶ 46.) The Complaint alleges that "the putative Class(es) exceed several hundred customers." (*Id.* ¶ 48.)

13. Accordingly, based on the allegations in the Complaint, the aggregate number of members of the putative class is greater than 100 for purposes of 28 U.S.C. § 1332(d)(5)(B).

B. Minimal Diversity Exists.

14. This Court has original jurisdiction under CAFA when the parties in a class action are minimally diverse. *See* 28 U.S.C. § 1332(d)(2)(A) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the

sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which – (A) *any member of a class of plaintiffs is a citizen of a State different from any defendant*. . . .) (emphasis added).

15. Home Depot is, and was at the time it was served with the Complaint, a corporation duly organized and validly existing under the laws of the State of Delaware, which maintains its principal place of business in Georgia. (Compl. ¶ 10.) Home Depot, therefore, is a citizen of Delaware and Georgia.

16. Plaintiff Jackson alleges that he is a citizen of North Carolina. (Compl. ¶ 8.) He also purports to represent other class members from North Carolina. (Compl. ¶ 31.)

17. Because at least one member of the putative class is diverse from at least one defendant, the requirements for minimal diversity under 28 U.S.C. § 1332(d)(2)(A) are satisfied.

C. The Amount in Controversy Exceeds $5 Million.

18. "Courts generally determine the amount in controversy by reference to the plaintiff's complaint." *JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 638 (4th Cir. 2010). "In most cases, the sum claimed by the plaintiff controls the amount in controversy determination." *Id.* (internal quotation marks omitted). At the appropriate time, Home Depot will demonstrate that Jackson and the putative class are not entitled to any of the relief sought in the Complaint, but for purposes of the removal analysis, the allegations in the Complaint demonstrate that the amount in controversy exceeds $5 million.

19. This action arises out of alleged misconduct by sales representatives of CWS in connection with the sale of water treatment systems. The Complaint generally alleges that Jackson and the purported class(es) have suffered injury based on "the unlawful sale of $9,000 water treatment systems to Class members based on an illegal referral program and based upon a false and misleading water test." (Compl. ¶ 50.)

20. The Complaint seeks, among other remedies, "damages (including but not limited to consideration paid), injunctive relief, and attorney's fees and costs." (Compl. ¶¶ 62, 71.) The Complaint also seeks "restitution and treble damages" under the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"). (Compl. ¶ 70.)

21. The Complaint therefore seeks damages in the amount of at least $9,000 per person (Compl. ¶ 50) on behalf of "several hundred customers" (*id.* ¶ 48), and then seeks to triple that amount (*id.* ¶ 70).

22. Assuming a class of 200 members (the smallest number that might conceivably qualify as "several hundred"), the amount in controversy in this case based solely on this speculative element of the putative class members' alleged damages is at least $5,400,000.

23. Moreover, as noted above, in addition to "damages (including but not limited to consideration paid)," "restitution and treble damages," the Complaint also seeks injunctive relief and attorneys' fees (Compl. ¶¶ 62, 70, 71), reinforcing the conclusion that the amount in controversy far exceeds $5 million.

24. The request for an award of attorneys' fees must be considered in determining the amount in con-

troversy. *See Respess v. Crop Prod. Servs., Inc.*, No. 4:15-CV-00176-BR, 2016 WL 3821163, at *3 (E.D.N.C. July 13, 2016) (aggregating damages alleged in complaint to evaluate amount in controversy because "it is facially apparent that plaintiffs' UDTPA claim could result in an award of treble damages and attorneys' fees in addition to actual damages").

25. If Jackson is successful in his pursuit of attorneys' fees, that itself could add upwards of a million dollars to the recovery amount. *See Cole v. Wells Fargo Bank*, N.A., No. 1:15-CV-00039-MR, 2016 WL 737943, at *4 (W.D.N.C. Feb. 23, 2016) (in case involving alleged unfair and deceptive trade practices, "applying experience and common sense, this Court estimates that if the Plaintiff prevails in this matter, that his attorneys' fees will *very likely exceed* the [approximately 16%] left to reach the jurisdictional threshold") (emphasis added).

26. Based on these facts, the amount in controversy of this putative class action far exceeds $5 million.

27. While Home Depot believes that the claims in the Complaint fail on the merits and class certification is not appropriate in this action, based on the Complaint's allegations, the amount in controversy in this matter (including, but not limited to, the requested disgorgement, punitive damages, and attorneys' fees) exceeds the jurisdictional threshold of $5 million set forth in 28 U.S.C. § 1332(d).

III. CONCLUSION

28. For all the reasons stated above, this action is removable to this Court pursuant to 28 U.S.C. §§ 1441,

1446 and 1453, and this Court may exercise jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d).

29. Promptly after the filing of this Notice of Removal, in accordance with 28 U.S.C. § 1446(d), Home Depot will give written notice of the Notice of Removal to Jackson and will file a copy of this Notice of Removal with the General Court of Justice, District Court Division, Mecklenburg County, North Carolina.

WHEREFORE, this action is hereby removed from the General Court of Justice, District Court Division, Mecklenburg County, North Carolina, to the United States District Court for the Western District of North Carolina pursuant to 28 U.S.C. §§ 1332(d), 1441 and 1453(b).

Respectfully submitted this 12th day of October, 2016.

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil No. 3:16-cv-00712-GCM

CITIBANK, N.A.,
Plaintiff/Counterclaim-Defendant,

v.

GEORGE W. JACKSON, on behalf of himself
and others similarly situated,
Defendant/Counterclaim-Plaintiff.

GEORGE W. JACKSON, on behalf of himself
and others similarly situated,
Counter-Plaintiff and Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC., AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

COUNTER-PLAINTIFF'S MOTION TO REMAND

Pursuant to 28 U.S.C. § 1447 (c), and for the reasons more fully addressed in the accompanying Memorandum of Law, Counter-Plaintiff and Defendant George Jackson, by and through undersigned counsel, hereby moves this Honorable Court for an Order remanding this matter to the General Court of Justice, District Court Division.

Third-Party Defendant Home Depot has not and cannot meet its burden of proof that this action meets the Class Action Fairness Act of 2005's ("CAFA") jurisdictional threshold of more than $5 million in controversy. 28 U.S.C. § 1332(d)(2). Also, the requirements of the local controversy exception to CAFA have been met and mandate remand. In addition, controlling

precedent expressly prohibits removal by a third-party/additional counter defendant like Home Depot.

For all these reasons, Counter-Plaintiff Jackson respectfully requests that the Court grant his Motion to Remand and award the reasonable attorneys' fees, costs and expenses associated with the preparation of this motion.

Dated: November 8, 2016

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil No. 3:16-cv-00712-GCM

GEORGE W. JACKSON, on behalf of himself and others similarly situated,
Third-Party Plaintiff,

v.

HOME DEPOT, U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

AMENDED THIRD PARTY CLASS ACTION CLAIMS

JURY TRIAL DEMANDED
INJUNCTIVE RELIEF SOUGHT

CASE REMOVED FROM
THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
MECKLENBURG COUNTY, NORTH CAROLINA,
16 CVD 1096

MOTION FOR REMAND PENDING

THIRD-PARTY CLASS ACTION CLAIMS

Third-Party Plaintiff, George W. Jackson ("JACKSON"), by and through the undersigned counsel, brings class action third-party claims against third-party defendants HOME DEPOT, U.S.A., INC. ("HOME DEPOT") and CAROLINA WATER SYSTEMS, INC. ("CWS"), as follows:

CLASS ACTION THIRD-PARTY CLAIMS

Third-Party Plaintiff JACKSON, on behalf of himself and all others similarly situated, brings claims against the Third-Party Defendants, as follows:

I. INTRODUCTION

1. JACKSON and putative class members were sold water treatment systems by HOME DEPOT and CWS. This is a consumer class action seeking to remedy HOME DEPOT and CWS's unfair and deceptive practices, as well as violations of other state laws.

2. North Carolina's Referral Sales Statute states prohibits the conduct at issue:

> The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) **at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful**. Any obligation of a buyer arising under such a sale shall be void and a nullity and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale.

G.S. § 25A-37 (emphasis added).

3. HOME DEPOT and CWS regularly and systematically utilize an illegal "Referral Program" to entice customers into purchasing an exorbitantly priced water treatment system. Under the HOME DEPOT and CWS referral program, customers who agree to refer other potential purchasing customers, the person making the referrals will be given the water treatment system for free, will receive referral checks to be

applied to the balance of their loan, or receive other valuable consideration.

4. However, the Referral Program offered to JACKSON violates North Carolina's Referral Sales Statute (N.C. Gen. Stat. § 25A-37), which prohibits such programs.

5. Accordingly, the Third-Party Defendants' conduct violates North Carolina's Referral Sales' statute, N.C. Gen. Stat. § 25A-37, and North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 et seq. ("UDTPA").

6. As a result of the North Carolina Referral Sales Statute, any and all contracts for the sale of water treatment systems under the Referral Program are "void and a nullity," including all contracts between Jackson and HOME DEPOT, CWS, or others having anything to do with the water treatment systems at issue.

II. JURSIDICTION AND VENUE

7. Third-Party Plaintiff Jackson contests the jurisdiction of this federal court, and has filed a Motion to Remand this entire case to state court for lack of CAFA jurisdiction.

8. The General Court of Justice, District Court Division, Mecklenburg County, North Carolina has proper jurisdiction over the claims alleged herein against the Third-Party Defendants in that at all times relevant to the events and transactions alleged herein, the Third-Party Defendants solicited, marketed, and sold water treatment systems to persons in this State, and otherwise acted in a manner to mitigate any due process concerns.

9. Venue is proper in Mecklenburg County, North Carolina since the acts alleged herein occurred in that county.

III. PARTIES

10. JACKSON is a natural person and resident of Mecklenburg County, North Carolina.

11. HOME DEPOT is a Delaware corporation with its principal place of business at 2455 Paces Ferry Road, Atlanta, Georgia 30339. HOME DEPOT does business in Mecklenburg County, and throughout the state of North Carolina, with a North Carolina registered mailing address of 327 Hillsborough Street, Raleigh, North Carolina 27603.

12. CWS is a North Carolina corporation conducting business in North Carolina and has its principal place of business at 1705 Orr Industrial Ct., Suite D, Charlotte, North Carolina 28213.

13. Upon information and belief, HOME DEPOT and CWS have entered into an agreement whereby CWS has agreed to sell water treatment systems as a HOME DEPOT representative, installation professional and/or agent. At all relevant times, HOME DEPOT and CWS solicited, distributed and sold water treatment systems to individuals in North Carolina using an unlawful systematic Referral Program as discussed in more detail below.

IV. FACTUAL ALLEGATIONS

14. Upon information and belief, beginning in 2014, HOME DEPOT and CWS routinely telephoned persons in the State of North Carolina for the purposes of soliciting and selling water treatment systems.

15. Upon information and belief, HOME DEPOT and CWS would represent that the contact information of the prospective purchaser was obtained from a person who purchased a water treatment system, and who was taking part in HOME DEPOT and CWS's Referral Program.

16. HOME DEPOT and CWS would represent to potential customers that "contaminants" were found in the tap water in nearby locations and infer that their tap water was unsafe.

17. HOME DEPOT and CWS set up appointments to come by a prospective purchaser's home for the purpose of "testing" their tap water.

18. HOME DEPOT and CWS would show up at the prospective purchaser's house for the purpose of conducting a water test. However, the simple water "test" was in fact a full sales presentation, which included props and a scripted sales pitch.

19. During the sales presentation, HOME DEPOT and CWS conducted a few water tests, including one test that required the use of vials of a prospective purchaser's tap water from the faucet and the dropping of liquids into each vial.

20. Upon information and belief, the water "test" performed by HOME DEPOT and CWS routinely indicated that the prospective purchaser's tap-water was unsafe, contaminated, or that there were cancer-causing agents in the water.

21. In addition, upon information and belief, HOME DEPOT and CWS used standardized documents, charts and graphs as part of its scripted presentation which contained false information

indicating that the prospective purchaser's tap water was harmful to their health.

22. Upon information and belief, HOME DEPOT and CWS enrolled customers into its Referral Program which indicated that they could receive the water treatment system for free if they referred other customers who also purchased a water system. HOME DEPOT and CWS's Referral Program also provided that enrolled customers would receive money towards their purchase price for each referral who bought a water system, and additional money for each referral who simply listened to the sales presentation.

23. Further, HOME DEPOT and CWS also routinely offered a promotion whereby the prospective purchaser didn't have to pay sales tax for the system if they agreed to purchase it immediately. Upon information and belief, customers were not required to pay sales tax on the water treatment systems sold by HOME DEPOT and CWS under North Carolina law.

24. HOME DEPOT and CWS routinely installed their water treatment systems sold under this impermissible Referral Program on the day after the purchase agreement, or Home Improvement Agreement ("HIA) was signed, and before customers' three-day right to cancel had expired.

25. At all relevant times, CWS was acting as an authorized representative and agent of HOME DEPOT.

26. In 2014, JACKSON was a customer who was solicited through the Referral Program and who ultimately purchased a water system under this impermissible Referral Program.

27. JACKSON signed a Home Improvement Agreement ("HIA") with HOME DEPOT. A true and correct copy of the HIA is attached hereto as **Exhibit A**.

28. JACKSON did not receive his water treatment system free of charge, despite making referrals to HOME DEPOT and CWS.

29. To the best of his knowledge, JACKSON has paid $1,080.00 to date for the water system sold to him by HOME DEPOT and CWS

V. ALLEGATIONS COMMON TO THE CLASS

30. CWS is an authorized representative and agent of HOME DEPOT and routinely enters into contracts on behalf of HOME DEPOT through the use of Home Improvement Agreements such as the one used in the JACKSON transaction and attached as Exhibit A.

31. HOME DEPOT and CWS use a standardized and scripted marketing scheme designed to help them avoid certain laws related to telephone solicitation and home improvement sales. HOME DEPOT and CWS knowingly and willfully target new homeowners and other customers using the Referral Program, whereby customers refer their friends with the promise that a certain number of referrals will allow the customer to get the water treatment system for free. This gives HOME DEPOT and CWS a constant source of sales leads while enticing customers to purchase the product under the guise that it will be free.

32. At all relevant times, HOME DEPOT and CWS regularly and systematically used an unlawful Referral Program to entice customers into purchasing the water treatment equipment under the customers' mistaken belief that the cost of the water treatment

system would be fully or partially offset based on the referral of other customers.

33. Some customers are approached by HOME DEPOT and CWS when they shop at HOME DEPOT using standardized communications and "water test kits," while others are contacted after a neighbor, family or friend refers them through the Referral Program. All customers are given the offer to take part in the Referral Program.

34. To help arrange sales demonstrations, HOME DEPOT and CWS routinely and systematically offer a free test of the consumer's tap water.

35. Instead of a brief water test, when HOME DEPOT and CWS gain access to a homeowner's residence, a standardized and scripted sales pitch occurs that is uniform in virtually every case, and which often lasts three hours or longer. HOME DEPOT and CWS employ a scripted presentation that employees and representatives are required to memorize and to follow in every home solicitation. The scripted pitch includes a water "test," which is designed to frighten and deceive the average homeowner, and to cause concern over the safety of the homeowner's tap water.

36. The water "tests" employed by HOME DEPOT and CWS involve the taking of vials of the tap water and adding unidentified chemical drops. In reality, this precipitant test only measures the hardness of the water and not whether it's harmful or contains contaminants. This test is used to improperly infer that the tap water contains pollution, harmful chemicals, and other cancer-causing carcinogens.

37. HOME DEPOT and CWS's water test scheme is so notorious that multiple states have specifically warned consumers to avoid being duped by it.[1]

38. Despite the fact that HOME DEPOT and CWS's Referral Program and tests constitute unfair and deceptive trade practices, HOME DEPOT and CWS continue to uniformly represent this information to customers because their entire business model is based on the Referral Program and fear tactics regarding the condition of their tap water.

VI. CLASS ACTION ALLEGATIONS

39. Pursuant to Rule 23 of the Rules of Civil Procedure (N.C. G.S. § 1A-1, Rule 23), JACKSON brings this action for himself and on behalf of all other persons similarly situated.

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[1] For example, the state of Florida Attorney General's website states:

> **"How to Protect Yourself: Water Treatment Devices: Avoid "Free" home water tests**
>
> Fraudulent sellers that advertise "free home water testing" may only be interested in selling you their water treatment device, whether you need it, or not. In performing the test, the salesperson may add tablets or droplets of chemicals to your tap water, explaining that the water will change color or that particles will form if the water is contaminated. When the water changes color before your eyes, the salesperson may warn you that the water is polluted and may cause cancer. In almost all of these cases, any water (even spring water) would "fail" the company's test."

(http://myfloridalegal.com/pages.nsf/main/3d0fd1650fc920c485256cc900698282!OpenDocument.)

40. The Class(es) sought to be certified are defined as follows:

> **HOME DEPOT CLASS:** All persons in the state of North Carolina that entered into a Home Improvement Agreement with Home Depot for "water treatment" equipment substantially similar to Exhibit A, during the Class Period.
>
> **CWS CLASS**: All persons in the state of North Carolina that purchased a Water Treatment System from Carolina Water Systems, Inc., during the Class Period.

41. The Class Period for each claim begins four years prior to the filing of the claims asserted herein and ends when notice certifying the Class(es) is ordered by the Court.

42. JACKSON is unable to state the exact number of members of the Class(es) because that information is solely in the possession of the Third-Party Defendants. However, JACKSON believes that the putative Class(es) exceed forty (40) customers and is therefore so numerous that joinder of all members would be impracticable.

43. Questions of law or fact common to the Class(es) exist and predominate over questions affecting only individual members, including, *inter alia*, the following:

(a) Whether HOME DEPOT and CWS's selling of water treatment systems using a Referral System violates the North Carolina's Referral Sales statute and/or G.S. § 75-1.1;

(b) Whether HOME DEPOT and CWS's use of the unlawful Referral Program constitutes an unfair and

deceptive trade practices in violation of G.S. § 75-1.1; and

(c) Whether HOME DEPOT and CWS's standardized testing procedure constitutes an unfair and deceptive trade practice in violation of G.S. § 75-1.1

44. The claims asserted by JACKSON in this action are typical of the claims of the members of the Class(es) as defined above because HOME DEPOT and CWS use standardized referral programs, tests, and contracts. The claims in this action arise from the uniform course of conduct by HOME DEPOT and CWS in the unlawful sale of water treatment systems to Class members based on an illegal Referral Program and based upon a false and misleading water test. Because HOME DEPOT and CWS routinely solicit customers based on a uniform Referral Program, JACKSON's claims are typical of the Class(es) he seeks to represent.

45. JACKSON will fairly and adequately represent and protect the interests of the members of the Class(es) because he has no interest antagonistic to the Class(es) he seeks to represent, and because the adjudication of his claims will necessarily decide the identical issue for other class members. There is nothing peculiar about JACKSON's transaction that would make him inadequate as class representative. JACKSON has retained counsel competent and experienced in both consumer protection and class action litigation.

46. A class action is superior to other methods for the fair and efficient adjudication of this controversy because the economic damages suffered by each individual class member will be relatively modest, compared to the expense and burden of individual

litigation. It would be impracticable for each class member to seek redress individually for the wrongful conduct alleged herein because the cost of such individual litigation would be cost prohibitive. It would be difficult, if not impossible, to obtain counsel to represent JACKSON and other class members on an individual basis for such small claims. More importantly, the vast majority of class members are not aware that the referral scheme and contracts used by HOME DEPOT and CWS violate the UDTPA and other state laws, and a class action is the only viable means of adjudicating their rights. There will be no difficulty in the management of this litigation as a class action, as the legal issues affect a standardized pattern of conduct by HOME DEPOT and CWS.

47. HOME DEPOT and CWS also acted and refused to act on grounds generally applicable to the Class(es), thereby making appropriate declaratory relief and corresponding final injunctive relief with respect to the Class(es) as a whole. HOME DEPOT and CWS should be enjoined from the conduct alleged herein.

COUNT I
VIOLATION OF REFERRAL SALES STATUTE
BY HOME DEPOT AND CWS

48. JACKSON re-alleges paragraphs 1 through 47 above as if set forth fully in this Count.

49. Third Party Defendants HOME DEPOT and CWS sell water treatment systems through home solicitation and referral sales. HOME DEPOT and CWS knowingly and willfully solicit and sell their water treatment systems by offering free products and/or

compensation to potential customers who agree to refer other customers to HOME DEPOT and CWS.

50. JACKSON and Class members were solicited by HOME DEPOT and CWS at their homes, and purchased water treatment systems after HOME DEPOT and CWS represented that the purchase price of the water treatment systems would be reimbursed after they referred other individuals to listen to HOME DEPOT and CWS's sales demonstrations, and that they would receive referral checks for referrals.

51. North Carolina's Referral Sales statute states:

> The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) **at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful**. Any obligation of a buyer arising under such a sale shall be void and a nullity and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale.

G.S. § 25A-37 (emphasis added).

52. A "referral sale" is a transaction in which a person is induced to purchase goods or service upon the representation that the purchaser can reduce or recover the purchase price, or earn a commission or

other consideration, by referring other prospective buyers to the seller for similar purchases.

53. Here, JACKSON and class members purchased a water treatment system from HOME DEPOT and CWS that included payments and other consideration based upon the procurement of prospective customers in violation of G.S. § 25A-37.

54. Exhibit A is a HOME DEPOT contract for JACKSON's transaction which specifically references the Referral Program.

55. JACKSON's and class members' contracts and sales constitute an unlawful referral sale in violation of G.S. § 25A-37.

56. As a result, JACKSON and class members are entitled to a declaration that their obligations under the agreement are void and a nullity, damages (including but not limited to consideration paid), injunctive relief, and attorney's fees and costs as allowable under the Referral Sales Statute.

COUNT II
VIOLATION OF NORTH CAROLINA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT BY HOME DEPOT AND CWS

57. JACKSON re-alleges paragraphs 1 through 47 above as if set forth fully in this Count.

58. G.S. § 75-1.1 states that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

59. The purpose of G.S. § 75-1.1 was "to encourage enforcement of the act by private individuals injured by unfair trade practices."

60. HOME DEPOT and CWS's soliciting and selling of water treatment systems through home solicitations and referral sales constitutes "commerce" as defined by G.S. § 75-1.1.

61. HOME DEPOT and CWS's violation of the Referral Sales statute constitutes a *per se* violation of G.S. § 75-1.1 (see G.S. § 25A-44(4)). Moreover, HOME DEPOT and CWS violated G.S. § 75-1.1 by, inter alia, by performing precipitant tests on customers' tap water as indicative of pollution or contamination.

62. As a proximate result of HOME DEPOT and CWS's unfair and deceptive conduct, JACKSON and class members have been harmed.

63. JACKSON and class members are entitled to restitution and treble damages pursuant to G.S. § 75-16, as a remedy to HOME DEPOT and CWS's continuing pattern and practice of unfair and deceptive trade practices.

64. JACKSON and class members are also entitled to injunctive relief, and attorney's fees and costs pursuant to G.S. § 75-16.1.

PRAYER FOR RELIEF

WHEREFORE, JACKSON, individually and on behalf of all others similarly situated, prays for a judgment against the Third-Party Defendants, as follows:

a) For an order certifying the Class(es), pursuant to Rule 23 of the North Carolina Rules of Civil Procedure as provided in N.C. Gen. Stat. § 1A-1;

b) For an order appointing JACKSON as representative of the Class(es), and appointing the law firms representing JACKSON as counsel for the Class(es);

c) Enter all appropriate orders, for discovery and otherwise, consistent therewith; and

d) Enjoin the Third-Party Defendants from further violations of N.C. G. S. § 25A-37 and § 75-1.1.

DEMAND FOR A JURY TRIAL

JACKSON, on behalf of himself and all others similarly situated, hereby demands a trial by jury.

Dated: November 18, 2016

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 3:16-cv-00712-GCM

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

GEORGE W. JACKSON,
Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

MEMORANDUM OF LAW IN SUPPORT OF HOME DEPOT U.S.A., INC.'S MOTION TO DISMISS IN FAVOR OF ARBITRATION

* * *

Third party plaintiff George W. Jackson[1] is bound by two separate agreements to arbitrate this dispute. The Court should therefore dismiss this lawsuit under the Federal Arbitration Act ("FAA"), and pursuant to

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[1] Although Mr. Jackson is currently labeled as "Defendant/Counter-Plaintiff" in the case caption, Citibank voluntarily dismissed the only claim against Mr. Jackson in this lawsuit, and Mr. Jackson has withdrawn his counterclaim against Citibank. As a result, the only claims remaining in this lawsuit are Mr. Jackson's putative class action claims against Home Depot and CWS. Home Depot has filed a motion to realign Mr. Jackson as a plaintiff, and Home Depot and CWS as defendants. *See* ECF Nos. 14-15.

Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Mr. Jackson purchased a water treatment system from Carolina Water Systems, Inc. ("CWS") using a Home Depot Consumer Credit Card issued by Citibank, N.A. ("Citibank"). When Mr. Jackson stopped making payments for the water treatment system, Citibank filed suit against Mr. Jackson. In response, Mr. Jackson asserted an individual counterclaim against Citibank and filed putative third party class action claims against Home Depot U.S.A., Inc. ("Home Depot") and CWS. The crux of these claims is that Home Depot and CWS allegedly violated North Carolina law by engaging in referral sales and unfair or deceptive trade practices in connection with Mr. Jackson's purchase of his water treatment system. *See generally* Answer, Affirmative Defenses, Counterclaim and Third-Party Class Action Claims (the "Complaint" or "Compl.").

Because the agreement governing Mr. Jackson's Citibank account (the "Card Agreement") requires arbitration of any counterclaim or third party claims filed by Mr. Jackson, Citibank and Home Depot moved to compel arbitration of the claims asserted in the Complaint and dismiss this lawsuit.[2] ECF Nos. 11-13, 16-18. After Citibank and Home Depot filed their motions, Mr. Jackson amended the Complaint to remove any reference to Citibank or the Citibank account he

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[2] As discussed below, CWS and Home Depot also moved to dismiss the Complaint in favor of arbitration under the agreement governing Mr. Jackson's purchase of the water treatment system from CWS (the "Purchase Agreement").

used to purchase the water treatment system. ECF No. 30 ("Amended Complaint" or "Am. Compl.").

Although Mr. Jackson has withdrawn his counterclaim against Citibank and his allegations concerning the financing of his water treatment system, all of Mr. Jackson's claims against Home Depot are still subject to arbitration under the Card Agreement, which contains a broad arbitration provision requiring individual (non-class) arbitration of all claims "relating to [Mr. Jackson's] account," including claims made "against anyone connected with" Citibank, such as Home Depot. Mr. Jackson seeks to void the Card Agreement, invalidate the accompanying debt to Citibank, and compel Home Depot to compensate Mr. Jackson for the payments he made on his Citibank account. Mr. Jackson's amended claims thus directly relate to his Citibank account and remain squarely within the definition of claims covered by the Card Agreement's arbitration provision, and Home Depot retains the right to seek enforcement of the arbitration provision as a third party beneficiary, notwithstanding Mr. Jackson's decision to withdraw his claim against Citibank.

In addition, the Purchase Agreement between CWS and Mr. Jackson provides an independent basis for dismissal of Mr. Jackson's claims in favor of arbitration. The Purchase Agreement contains a broad arbitration provision that governs "all claims, disputes and controversies arising out of or in connection with this contract." Mr. Jackson's amendment of the Complaint to remove any reference to Citibank has no effect on the applicability of the arbitration provision in the Purchase Agreement.

Courts around the country routinely enforce arbitration provisions similar to the ones at issue here, and either of the two agreements is independently sufficient to send this dispute to arbitration. The Court should therefore grant this motion and dismiss Mr. Jackson's Amended Complaint.

RELEVANT FACTUAL BACKGROUND

Mr. Jackson is the holder of a Citibank-issued Home Depot credit card account (the "Account"). *See* Baker Aff. ¶ 11 & Ex. A.[3] Although referred to as a "Home Depot Consumer Credit Card" account, "Citibank is the owner of the Account." *Id.* Mr. Jackson used this Account to finance and pay for his purchase of the water treatment system, which he alleges "was financed through Home Depot either directly through Citibank, or by subsequent assignment." *See* Compl. ¶ 24.

The Card Agreement governing the Account contains a broad arbitration agreement:

> **ARBITRATION**
>
> ***PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.*** **IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO INITIATE OR PARTICIPATE**

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[3] "Baker Aff." refers to the Affidavit of Shelley R. Baker, dated May 24, 2016, originally filed in North Carolina state court, and available as an exhibit to Home Depot's brief in support of its pending motion to realign the parties. ECF Nos. 14-15.

IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.

Agreement to Arbitrate: Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").

Claims Covered

What Claims are subject to arbitration? All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims. A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. Claims and remedies sought

as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis.

Whose Claims are subject to arbitration? Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant, authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir assignee, or trustee in bankruptcy.

* * *

Broadest Interpretation. Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

* * *

What about debt collections? We and anyone to whom we assign your debt will not initiate an arbitration proceeding to collect a debt from you unless you assert a Claim against us or our assignee. We and any assignee may seek arbitration on an individual basis of any Claim asserted by you, whether in arbitration or any proceeding, including in a proceeding to collect a debt.

Ryning Aff., Ex. 1 (emphasis in original).[4] The arbitration agreement makes it clear that "Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise" are subject to arbitration, and that "Claims made by or against anyone connected with [Citibank]" are subject to arbitration. *Id.*

The Purchase Agreement between Mr. Jackson and CWS also contains a broad arbitration provision that states: "THIS CONTRACT CONTAINS A BINDING AGREEMENT TO ARBITRATE ALL CLAIMS, DISPUTES AND CONTROVERSIES ARISING OUT OF OR IN CONNECTION WITH THIS CONTRACT." Blum Decl., Ex. A ¶ 5 (capitalization in original); *see also id.* ("Any controversy, claim or dispute arising out of or relating to this Agreement shall be submitted to arbitration in Charlotte, North Carolina in accordance with the rules and laws of the State of North Carolina.").[5] By its plain language, the Purchase Agreement therefore provides that any and all claims arising out of, in connection with, or relating to Mr. Jackson's purchase of a water treatment system shall be arbitrated.

In the Amended Complaint, Mr. Jackson asserts claims against Home Depot and CWS for alleged violations of North Carolina's referral sales statute, N.C. Gen. Stat. § 25A-37 (Am. Compl. ¶¶ 48-56), and unfair and deceptive trade practices statute, N.C. Gen. Stat.

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[4] "Ryning Aff." refers to the Affidavit of Terri Ryning, dated October 18, 2016, which accompanies Citibank's motion to dismiss. ECF No. 13.

[5] "Blum Decl." refers to the Declaration of John Blum, dated October 27, 2016, which accompanies CWS's motion to dismiss. ECF No. 16-1.

§ 75-1.1 (Am. Compl. ¶¶ 57-67), based on the sale of the water treatment system. Mr. Jackson alleges that "all contracts between Jackson and HOME DEPOT, CWS, or others having anything to do with the water treatment systems at issue" are "'void and a nullity.'" Am. Compl. ¶ 5. Among other relief, Mr. Jackson seeks "damages (including but not limited to consideration paid)" under the referral sales statute and "restitution and treble damages" under the unfair and deceptive trade practices statute. Am. Compl. ¶¶ 56, 63.

LEGAL STANDARD

The FAA permits private parties to waive the judicial process, with its expense and delays, in favor of the lower cost, informality, simplicity, and speed of arbitration. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (arbitration "is usually cheaper and faster than litigation") (citation omitted). "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 2 "reflect[s] both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract,'" such that "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted).

Specifically, Section 2 of the FAA provides that a written arbitration provision in any contract involving interstate or international commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If there are any doubts concerning a dispute's arbitrability, such doubts must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense...."); *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 711 (4th Cir. 2001) ("federal policy requires that ambiguities in arbitration clauses be resolved in favor of arbitration"); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) ("we may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute'") (citation omitted).

Under the FAA, a dispute must be resolved in arbitration where (1) a binding arbitration agreement exists and (2) the dispute falls within the scope of that agreement. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-28 (1985) (endorsing this "two-step inquiry"); *Hightower v. GMRI, Inc.*, 272 F. 3d 239, 242 (4th Cir. 2001) (conducting two-step inquiry while also noting that "North Carolina has expressed strong support for utilizing arbitration to settle disputes"); *Keena v. Groupon, Inc.*, 2016 WL 3450828, at *2 (W.D.N.C. Jun. 21, 2016) (Mullen,

J.) ("This Court must compel arbitration if: '(i) the parties have entered into a valid agreement to arbitrate, and (ii) the dispute in question falls within the scope of the arbitration agreement.'") (quoting *Chorley Enter., Inc. v. Dickey's Barbecue Rest., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015)). Both requirements are met in this case.

ARGUMENT

I. THE CARD AGREEMENT REQUIRES ARBITRATION OF MR. JACKSON'S CLAIMS AGAINST HOME DEPOT.

A. The Arbitration Agreement Is Valid And Enforceable.

"To determine whether the parties agreed to arbitrate, courts apply state law principles governing contract formation." *Hightower*, 272 F. 3d at 242. The Card Agreement, which contains the applicable arbitration agreement, is expressly governed by a South Dakota choice-of-law provision. Ryning Aff., Ex. 1; *Keena v. Groupon*, 2016 WL 3450828, at *2 (applying choice of law provision and enforcing arbitration agreement). South Dakota law strongly favors arbitration. *See, e.g., Rossi Fine Jewelers, Inc. v. Gunderson*, 648 N.W.2d 812, 814 (S.D. 2002) ("We have consistently favored the resolution of disputes by arbitration . . . . If there is doubt whether a case should be resolved by traditional judicial means or by arbitration, arbitration will prevail.").[6]

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[6] Even if South Dakota or any other applicable state law did not support arbitration, "the Federal Arbitration Act favors strict

Under South Dakota law, Jackson's use of the Account constitutes his acceptance of the terms of the Card Agreement, including the arbitration agreement. *See* S.D. Codified Laws § 54-11-9 ("use of an accepted credit card or the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without written notice from a card holder to cancel the account creates a binding contract between the card holder and the card issuer . . . ."); *see also Cayanan v. Citi Holdings, Inc.*, 928 F. Supp. 2d 1182, 1199 (S.D. Cal. 2013) (holding that under South Dakota law, "continued use of a credit [card] account" constitutes assent to arbitration). Indeed, numerous courts have found the same or a substantially similar Citibank arbitration agreement to be valid and enforceable. *See, e.g.*, *Drozdowski v. Citibank, Inc.*, No. 2:15-cv-2786-STA-cgc, 2016 WL 4544543, at *7 (W.D. Tenn. Aug. 31, 2016); *McCormick v. Citibank, N.A.*, No. 15-CV-46-JTC, 2016 WL 107911, at *6 (W.D.N.Y. Jan. 8, 2016); *Carr v. Citibank, N.A.*, No. 15-cv-6993

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enforcement of arbitration provisions and preempts state laws that interfere with arbitration." *Keena v. Groupon*, 2016 WL 3450828, at *7. Moreover, there can be no dispute that the parties' relationship involves interstate commerce, which is sufficient to bring it into the ambit of the FAA. *See Allied-Bruce Terminix*, 513 U.S. at 277 (holding that the FAA is extremely broad and applies to any transaction directly or indirectly affecting interstate commerce). The Complaint alleged that Mr. Jackson is a resident of North Carolina who used a credit card issued by Citibank, a New York corporation based in South Dakota, to purchase a water treatment system from Home Depot, a Delaware corporation based in Georgia, and CWS, a North Carolina corporation. Compl. ¶¶ 8-11, 20, 24, 75. Mr. Jackson repeats his allegations concerning his citizenship and the citizenship of Home Depot and CWS in the Amended Complaint, but omits any reference to Citibank. Am Compl. ¶¶10-12.

(SAS), 2015 WL 9598797, at *3 (S.D.N.Y. Dec. 23, 2015); *Clookey v. Citibank, N.A.*, No. 8:14-cv-1318, 2015 WL 8484514, at *5 (N.D.N.Y. Dec. 9, 2015). This Court should as well.

B. The Arbitration Agreement In The Card Agreement Encompasses Mr. Jackson's Claims Against Home Depot.

This entire dispute centers on Mr. Jackson's purchase of a water treatment system using the Account and therefore must be arbitrated. "To decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988). Courts must respect "the FAA's command to enforce arbitration agreements" as they are written. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 n.5 (2013); *see also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25-26 (2011) (holding that the FAA "requires courts to enforce the bargain of the parties to arbitrate" and "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed") (citation omitted); *AT&T Mobility*, 563 U.S. at 344 (confirming that the "'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'") (citation omitted). Moreover, the party resisting arbitration bears the burden of showing that the arbitration agreement does not apply. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

Under South Dakota law, "[t]he language in a contract is given its 'plain and ordinary meaning.'" *Kozlowski v. Palmquist*, No. 4:12-CV-04174-KES, 2016 WL 1255711, at *10 (D.S.D. Mar. 29, 2016) (quoting *Am. State Bank v. Adkins*, 458 N.W.2d 807, 809 (S.D. 1990)); *see also Kleinsasser v. Weber*, 877 N.W.2d 86, 96 (S.D. 2016) ("When examining a contract, we give words their 'plain and ordinary meaning.'") (citation omitted). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. In other words, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," the dispute should be sent to arbitration. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986).

In the Card Agreement, Mr. Jackson agreed to arbitrate "[a]ll Claims relating to [his] account." Ryning Aff., Ex. 1.[7] In the Complaint, Mr. Jackson alleged unfair and deceptive trade practices in connection with his purchase of a water treatment system using financing from Home Depot and Citibank. *See* Compl. ¶ 18 ("the sales representative informed Mr. Jackson that he would qualify for financing through Home Depot which offered 0% interest for 24 months..."), ¶ 24 ("Jackson's purchase was financed through Home

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[7] Moreover, in the Card Agreement, Mr. Jackson agreed to submit to arbitration threshold disputes "regarding the application, enforceability, or interpretation of [the Card Agreement] and [its] arbitration provision." *See* Ryning Aff., Ex. 1 at 5. Accordingly, there is "clear and unmistakable intent" that an arbitrator should decide the arbitrability of this dispute in the first instance. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Depot either directly through Citibank, or by subsequent assignment."); ¶ 28 (complaining of "25.99% interest rate"). Although Mr. Jackson amended the Complaint to remove any references to Citibank or the financing of his water treatment system, Mr. Jackson cannot deny that he financed the purchase with his Citibank Account, and his remaining claims relate to the Account.

In the Amended Complaint, Mr. Jackson alleges that "all contracts ... having anything to do with the water treatment systems at issue" are "'void and a nullity'" (Am. Compl. ¶ 5), and he continues to seek the return of the "consideration paid" in the transaction as well as "restitution." Am. Compl. ¶¶ 56, 63. Mr. Jackson therefore seeks to invalidate the Card Agreement and his accompanying debt to Citibank and to have Home Depot compensate him for the payments he has made on his Citibank Account. These allegations undoubtedly raise a dispute "relating to [Mr. Jackson's] account," which is all that is required under the broad arbitration provision in the Card Agreement.

Indeed, before its dismissal, Citibank also invoked the arbitration agreement because Mr. Jackson's counterclaim against Citibank was subject to arbitration. *See* ECF No. 11. Mr. Jackson's interrelated claims against Home Depot are therefore also subject to arbitration. *See, e.g.*, Compl. ¶ 75 ("Citibank is subject to all claims and defenses that Jackson has against Home Depot and CWS . . . . Therefore, Citibank is jointly and severally liable to Jackson, who financed the purchase of his water treatment system through Home Depot, which directly sold or assigned the transaction to Citibank."). Mr. Jackson's decision to withdraw his claims against Citibank does not sever

the relationship between his claims against Home Depot and his Citibank Account.

C. Home Depot May Enforce Mr. Jackson's Arbitration Obligations.

"[A] nonsignatory may enforce an arbitration agreement under a third party beneficiary theory when the parties to the agreement have agreed, upon the formation of their agreement, to confer the benefits thereof to the nonsignatory." *Geier v. m-Qube Inc.*, 824 F.3d 797, 801 (9th Cir. 2016) (quoting *Gibson v. Wal-Mart Stores, Inc.*, 181 F.3d 1163, 1170 n.3 (10th Cir. 1999)); *see also Washington Square Sec., Inc. v. Aune*, 253 F. Supp. 2d 839, 844 (W.D.N.C. 2003), *aff'd*, 385 F.3d 432 (4th Cir. 2004) (holding that third party beneficiaries could enforce arbitration provision); *Bey v. Midland Credit Mgmt., Inc.*, No. GJH-15-1329, 2016 WL 1226648, at *5 (D. Md. Mar. 23, 2016) (holding that a third party could enforce a Citibank arbitration agreement). Home Depot is just such a third-party beneficiary to the arbitration agreement here.

Under South Dakota law, a third party beneficiary exists where "[t]he terms of the contract . . . clearly express intent to benefit that party or an identifiable class of which the party is a member." *Jennings v. Rapid City Reg'l Hosp., Inc.*, 802 N.W.2d 918, 922 (S.D. 2011) (citation omitted). The arbitration agreement here expressly includes "Claims made ... against anyone connected with [Citibank]." Ryning Aff., Ex. 1. Home Depot is "connected with" Citibank because Citibank is the issuer of the Home Depot Consumer Credit Card Mr. Jackson used to finance the purchase of the water treatment system at issue. *See* Baker Aff. ¶ 11 & Ex. 1. Further, Mr. Jackson origi-

nally alleged that, together with Home Depot and CWS, "Citibank is jointly and severally liable to Jackson." Compl. ¶ 75. Mr. Jackson also alleged that Home Depot "directly sold or assigned the transaction to Citibank." *Id.*; *see also id.* ¶ 24 (alleging that "Jackson's purchase was financed through Home Depot either directly through Citibank, or by subsequent assignment"). While Mr. Jackson has withdrawn these allegations, he still seeks to have Home Depot compensate him for the amounts he paid on his Citibank Account. Am. Compl. ¶¶ 56, 63. Given this requested relief, Home Depot is "connected with" Citibank for purposes of the arbitration provision in the Card Agreement.

Mr. Jackson's Amended Complaint presents a dispute arising solely out of the purchase of a water treatment system using his Citibank-issued Home Depot credit card, a dispute that falls squarely within the scope of the arbitration provision. This entire dispute, therefore, may only be resolved by arbitration under the terms of the Card Agreement.

II. THE PURCHASE AGREEMENT REQUIRES ARBITRATION OF JACKSON'S CLAIMS AGAINST HOME DEPOT.

The Purchase Agreement between Mr. Jackson and CWS provides an independent basis for dismissing Mr. Jackson's claims in favor of arbitration. Under the arbitration provision of the Purchase Agreement, Mr. Jackson agreed "to arbitrate all claims, disputes and controversies arising out of or in connection with this contract" and that "[a]ny controversy, claim or dispute arising out of or relating to this Agreement shall be submitted to arbitration." Blum Decl., Ex. A ¶ 5. The Purchase Agreement is governed by North

Carolina law, *id.*, which strongly favors arbitration. *See, e.g.*, *Cyclone Roofing Co. v. David M. La Fave Co.*, 321 S.E.2d 872, 876 (N.C. 1984) (describing "the strong public policy in North Carolina favoring arbitration"). "When the language of the arbitration clause is 'clear and unambiguous,' [North Carolina courts] apply the plain meaning rule to interpret its scope." *Fontana v. Southeast Anesthesiology Consultants, P.A.*, 729 S.E.2d 80, 86 (N.C. App. 2012) (citation omitted). And even if there were ambiguity, North Carolina "public policy 'requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration.'" *Register v. White*, 599 S.E.2d 549, 556 (N.C. 2004) (quoting *Johnston Cty. V. R.N. Rouse & Co.*, 414 S.E.2d 30, 32 (N.C. 1992)).

Mr. Jackson's claims against Home Depot fall squarely within the scope of his agreement to arbitrate any and all claims, disputes, and controversies arising out of, relating to, or in connection with his purchase of a water treatment system. There can be no dispute that Mr. Jackson's claims that Home Depot and CWS violated the North Carolina referral sales and deceptive trade practices statutes arise out of and relate to Mr. Jackson's agreement to purchase his water treatment system, and his allegations in support of these claims do not distinguish between Home Depot and CWS. *See* Am. Compl. ¶¶ 48-56 (claim against Home Depot and CWS for violation of referral sales statue); ¶¶ 57-64 (claim against Home Depot and CWS for violation of deceptive trade practices statute). Mr. Jackson's claims against Home Depot and CWS therefore are subject to arbitration under the Purchase Agreement.

III. THIS ACTION SHOULD BE DISMISSED BECAUSE ALL OF THE ISSUES IN IT ARE ARBITRABLE.

Because this entire lawsuit belongs in arbitration, the Court should dismiss it. In this Circuit, "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." *Choice Hotels Internat'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-710 (4th Cir. 2001); *see also Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (affirming district court dismissal "on the ground that all of the issues presented in the suit were arbitrable"); *Payton v. Nordstrom, Inc.*, 462 F. Supp. 2d 706, 709 (M.D.N.C. 2006) (dismissing action where all of plaintiff's claims belonged in arbitration); *Minacca, Inc. v. Singh*, No. 3:09cv389-RJC-DCK, 2010 WL 2650877, at *4 (W.D.N.C. July 1, 2010) (same). Alternatively, under section 3 of the FAA, the Court may stay this action pending arbitration. *See* 9 U.S.C. § 3 (providing that, where a valid arbitration agreement applies, the district court shall stay the action "until such arbitration has been had in accordance with the terms of the agreement"). As described above, the arbitration agreements contained in the Card Agreement and the Purchase Agreement separately and independently encompass all of the issues in this lawsuit. The Court, therefore, should dismiss this entire action.

Respectfully submitted this 2nd day of December, 2016.

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil No. 3:16-cv-00712-GCM

GEORGE W. JACKSON, on behalf of himself and others similarly situated,
Third-Party Plaintiff,

v.

HOME DEPOT, U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

THIRD-PARTY CLASS ACTION CLAIMS

JURY TRIAL DEMANDED
INJUNCTIVE RELIEF SOUGHT

CASE REMOVED FROM
THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
MECKLENBURG COUNTY, NORTH CAROLINA,
16 CVD 1096

MOTION FOR REMAND PENDING

PLAINTIFF'S OPPOSITION TO THIRD-PART DEFENDANT HOME DEPOT U.S.A., INC.'S MOTION TO DISMISS IN FAVOR OF ARBITRATION

Third-Party Plaintiff George W. Jackson ("Mr. Jackson"), by and through undersigned counsel, hereby submits the following Opposition to Third-Party Defendant Home Depot, U.S.A., Inc.'s ("Home Depot") Motion to Dismiss in Favor of Arbitration. The Court should deny Home Depot's motion because: 1) the motion will be moot when this Court grants the pending Motion to Remand, which the Court must take up before reaching the merits of Home Depot's

motion; 2) Home Depot's contract with Mr. Jackson contains no arbitration clause; 3) the Citibank arbitration clause is not in this case, where Home Depot acknowledges it is not a party to the Citibank Cardholder Agreement; 4) the entire sales contract is a nullity, and there is therefore no arbitration clause in any contract to enforce, and; 5) the Carolina Water Systems arbitration clause is void and unenforceable as unconscionable, and because it was procured via fraud by omission.

BACKGROUND

Mr. Jackson was initially sued by Citibank NA ("Citibank") to collect an allegedly outstanding debt for a water filtration system purchased by Jackson from Home Depot and Third-Party Defendant Carolina Water Systems ("CWS"). Mr. Jackson timely answered and asserted a Third-Party class action complaint on August 26, 2016, alleging that Home Depot and CWS had a fraudulent and misleading scheme of misleading customers about the alleged dangerousness of their water and subsequently selling them unnecessary water filtration systems. Mr. Jackson further alleged that the scheme employed by Home Depot and CWS was an illegal and impermissible referral sales scheme. Mr. Jackson initially included Citibank in the class action complaint, by asserting affirmative defenses against Citibank for Truth in Lending Act Violations, and also asserting a separate count for Holder Rule liability. Notably, Count III was the only count of the original complaint alleged against Citibank, and was alleged against Citibank only. Counts I and II, alleged violations of the North Carolina Referral Sales Statute and the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"), against

Home Depot and CWS. Citibank was never included in those counts. *See* D.E. 1-1, Pages 16-19.

In the face of the class action complaint, Citibank voluntarily dismissed its lawsuit without prejudice against Jackson on September, 23 2016. Shortly thereafter on October 12, 2016, Home Depot removed the case to federal court. Mr. Jackson filed his Motion to Remand, and Citibank, Home Depot, and CWS all filed motions to dismiss in favor of arbitration.

Subsequent to the various arbitration motions being filed, on November 18, 2016, Mr. Jackson filed his First Amended Third-Party Class Action Complaint ("Amended Complaint"), D.E. Number 30. The Amended Complaint dropped the affirmative defenses against Citibank, as these defenses were mooted by Citibank's voluntary dismissal. Mr. Jackson also dropped his counterclaim for Holder Rule liability against Citibank (Count III) from the Amended Complaint. Mr. Jackson eliminated all references to Citibank, the credit card transaction, and the financing of the sales contract from the class action complaint. Currently, Plaintiff has no pending claim against Citibank, or that implicates Citibank's Cardholder Agreement. Nowhere in the Amended Complaint can the word "Citibank" be found. The Amended Complaint is now the operative complaint in this case.

The express claims that Mr. Jackson alleges in the Amended Complaint are the original Counts I and II only – a claim for violation of the North Carolina Referral Sales Statute, and a second claim for violation of the Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"). *See* D.E. Pages 10-13. These claims are alleged against Home Depot and CWS only. *Id.* The underlying facts asserted in the Amended

Complaint that support these two claims all relate to conduct that occurred *prior* to the financing of the transaction. *Id.* at Pages 4-8, ¶¶ 14-38. The only supporting document to the Amended Complaint is the Home Depot Home Improvement Agreement, D.E. 30-1.

After the Amended Complaint was filed, both Home Depot and CWS recognized the well-established principle that the filing of an amended complaint rendered their pending motions to dismiss moot. Both Home Depot and CWS re-filed their motions, and it is Home Depot's refiled Motion to Dismiss (D.E. 32) that comes now before this Court.

STATEMENT OF FACTS PERTINENT TO THIS MOTION

There are 2 separate contracts at issue. One contract is the 3 page CWS Purchase Agreement dated 7/24/2014, attached to CWS's Motion to Dismiss (D.E. 16-1). The second contract is Home Depot's 13-page Home Improvement Agreement dated 8/6/14, attached to the First Amended Third-Party Complaint as Exhibit A.

The 13-page Home Depot contract is very detailed. There is a Definitions section that identifies the parties to the contract as "You and Home Depot U.S.A., Inc." Exhibit A, Page 3 of 13. Notably, the Home Depot contract contains this merger clause:

> You understand this Agreement constitutes the entire understanding between You and Home Depot and may only be amended by a Change Order signed by Home Depot (or by Installation Professional or its authorized representative on Home Depot's behalf) and You. This Agreement expressly supersedes all

> prior written or verbal agreements or representations made by Home Depot, Installation Professional, You, or anyone else. Except as set forth in this Agreement, You agree there are no oral or written representations or inducements, express or implied, in any way conditioning this Agreement, and You expressly disclaim their existence.

The General Provisions page, Page 4 of 13, contains sections covering a wide array of topics, including without limitation Scope, Professional's Responsibilities, Your Responsibilities, Changes and Change Orders, Limited Warranty, Cancellation, Termination, and Returns. Notably, there is no arbitration clause in the Home Depot contract.

The Home Depot contract is indisputably a contract for both the water treatment system and the installation thereof. The cost listed on Page 3 of 13 is $8990.00, which is the cost of the water treatment system. That same page contains a provision for the customer to initial, authorizing "delivery of merchandise." On Page 7 of 13, the first words on that page are "The water treatment equipment quoted in this contract." That same page has a large section entitled "Specifications," where the "Equipment Information" is set forth, and lists 1 Water Conditioning System, 1 Household Filtration System, 1 Drinking Water System, and 1 Airmaster. Also, the Cancellation Provision on Page 9 of 13 references "any goods delivered to you under the contract or sale."

The CWS arbitration clause was intentionally and expressly not made a part of the Home Depot contract. Home Depot added one of the three pages of the CWS Purchase Agreement to its contract, and that page is

now Page 12 of 13 of Exhibit A. The page of the CWS Purchase Agreement that was added to the Home Depot contract is the Notice of Cancellation page of the CWS Purchase Agreement. That page does not include the arbitration clause. The fact that Home Depot added one of the three pages of the CWS Purchase Agreement to its contract, and did not add the other two pages, is evidence of Home Depot's intent to omit those other two pages. And it is one of the intentionally omitted two pages of the CWS Purchase Agreement that contains the arbitration clause.

ARGUMENT

1. Case law dictates that the Court should take up Mr. Jackson's Remand Motion first, and not reach this motion until remand is decided.

A critical preliminary question for this Court is the order in which it will address two of the currently pending motions – Plaintiff's Motion to Remand (D.E. 23) and Defendant's Home Depot's Motion to Dismiss (D.E. 32). Case law demonstrates that district courts across the country address remand motions first, and then will turn to dispositive motions if and only if the remand motion is denied. The reasons for this are obvious and dictated by both law and common sense. Federal courts are courts of limited jurisdiction. If a federal court lacks jurisdiction over a case, it may not decide the substantive issues in that case:

> The existence of subject matter jurisdiction is a threshold issue, and any case lacking a proper basis for subject matter jurisdiction must be dismissed. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96, 118 S.Ct. 1003,

> 140 L.Ed.2d 210 (1998). Accord *Jones v. American Postal Workers Union*, 192 F.3d 417, 422 (4th Cir.1999); and *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir.1999). In other words, it is well established that "[t]he subject matter jurisdiction of federal courts is limited and the federal courts may exercise only that jurisdiction which Congress has prescribed." *Chris v. Tenet*, 221 F.3d 648, 655 (4th Cir.2000), citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Accord *Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181, 186 (4th Cir.2002). The requirements are so absolute that "[n]o party need assert [a lack of complete diversity or the requisite amount in controversy]. No party can waive the defect, or consent to jurisdiction. No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own." *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 389, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (internal citations omitted). Accord *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

TC Arrowpoint, L.P. v. Choate Const. Co., No. 3:05CV267-H, 2005 WL 2148934, at *2 (W.D.N.C. Sept. 7, 2005). Plaintiff's Motion to Remand asserts that this Court lacks subject matter jurisdiction under 28 U.S.C. § 1332(d). If that Motion to Remand is granted, it would be an acknowledgment by this Court that it has no jurisdiction over this case. And the Court must have

subject matter jurisdiction to order arbitration under the Federal Arbitration Act:

> Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue. *E.g., Commercial Metals Co. v. Balfour, Guthrie, & Co.*, 577 F.2d 264, 268-269 (CA5 1978), and cases cited.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 34, 103 S. Ct. 927, 947, 74 L. Ed. 2d 765 (1983).

This is why the Motion to Remand must be taken up and decided prior to looking at the merits of Defendant Home Depot's Motion to Dismiss here. This principle was plainly and clearly articulated by the court in *Socoloff v. LRN Corp.*, No. CV 13-4910-CAS AGRX, 2013 WL 4479010 (C.D. Cal. Aug. 19, 2013), where the court had before it both a motion to remand and a motion to compel arbitration and found it must take up remand first because subject matter jurisdiction is needed to hear the arbitration motion:

> Because this Court requires subject matter jurisdiction in order to hear defendant's motion to compel arbitration, the Court first turns to plaintiff's motion to remand this action to state court.

Socoloff, 2013 WL 4479010, at *2.

In *Niami v. Fed. Exp. Print Servs., Inc.*, No. C 09-4384 JF, 2010 WL 958045 (N.D. Cal. Mar. 12, 2010), the court had before it a motion to remand for lack of

diversity jurisdiction, and a motion to compel arbitration and dismiss. The court analyzed and ruled on the motion to remand first, and then found the motion to compel arbitration moot due to the absence of federal jurisdiction: "Defendants' motion to compel arbitration is moot based on the absence of federal jurisdiction." *Niami,* 2010 WL 958045 at *7. A motion to compel arbitration and to dismiss was similarly mooted by a successful motion to remand in *Diego v. Golden Valley Health Centers*, No. 1:15-CV-00085-JAM, 2015 WL 4112276 (E.D. Cal. July 8, 2015) (plaintiff sought a stipulation to delay briefing on motion to compel arbitration until after a ruling on remand request, which would render arbitration motion moot.) *Diego,* 2015 WL 4112276, at *1.

The principle that the motion to remand is taken up first can even be seen in cases where the motion to remand is denied. In *Terrell Indep. Sch. Dist. v. Benesight, Inc.*, No. CIV.A. 301CV1834G, 2001 WL 1636418 (N.D. Tex. Dec. 18, 2001), the court analyzed and denied the motion to remand, and then turned to the motion to compel arbitration ("[h]aving disposed of Terrell's motion to remand, the only remaining motion before the court is Benesight's motion to compel arbitration." *Terrell,* 2001 WL 1636418, at *5); see also *Acosta v. Norwegian Cruise Line, Ltd.*, 303 F. Supp. 2d 1327, 1329 (S.D. Fla. 2003) (court analyzed plaintiff's six arguments in motion to remand prior to determining motion to compel arbitration).

Plaintiff has forcefully argued that this Court lacks subject matter jurisdiction, where the CAFA $5 million amount in controversy has not been shown, and cannot be shown. Plaintiff also argues that this case is covered by the Local Controversy exception to

CAFA jurisdiction which requires remand. This Court must take up the Motion to Remand first, and determine whether subject matter jurisdiction exists. Since this Court lacks jurisdiction, the Court need not even analyze the merits of Home Depot's Motion to Dismiss.

2. Home Depot's contract with Mr. Jackson contains no arbitration clause to enforce.

If this Court finds it has subject matter jurisdiction over this case and turns to the merits of Home Depot's motion to dismiss, the facts of this case dictate that the Court deny Home Depot's motion for a very simple reason – the contract between **Home Depot and Mr. Jackson contains no arbitration clause to enforce**.

Even a cursory review of Home Depot's contract with Mr. Jackson shows that it contains no arbitration clause. Further proving this point is that Home Depot does not, and cannot, point to such an arbitration clause in the instant motion, but instead attempts to rely upon the CWS and Citibank arbitration clauses. Home Depot is the author of its Home Improvement Agreement and could have inserted an arbitration clause, but it chose not to do so. Because the only contract between Mr. Jackson and Home Depot does not contain an arbitration clause, forcing Jackson to arbitrate his claims against Home Depot would be contrary to basic contract principles.

Despite Home Depot's herculean efforts to invoke the separate Citibank Cardholder Agreement, that contract and its arbitration clause are not in this case under the plain language of the operative complaint. The Home Depot contract plainly states in at least 3

separate places (first on Page 3 of 13, and then twice more on Page 4 of 14) that the Citibank Cardholder Agreement is a "separate" agreement, to which Home Depot is "NOT" a party. How Mr. Jackson paid for or financed the purchase of the water treatment system is irrelevant to the claims asserted in the Amended Complaint against Home Depot.

As for the CWS Purchase Agreement, Home Depot is not a party to that contract, nor was the CWS contract explicitly or implicitly incorporated into the Home Depot contract. In fact, Home Depot went out of its way to not include the CWS arbitration provision into its Agreement. Exhibit A to the Amended Complaint is the Customer Copy of the Home Depot Home Improvement Agreement. Home Depot added one of three pages of the CWS Purchase Agreement to its contract, and intentionally did not add the other two pages, including the page containing the arbitration clause. Home Depot certainly can't rely upon a clause that it went out of its way not to include.

Also, there is nothing in the Home Depot Home Improvement Agreement, dated 8/6/14, that states that the entire CWS Sales Contract dated 7/24/14 is incorporated therein, or that CWS was acting as Home Depot's agent, or that CWS is a party to the Home Depot Home Improvement Agreement. Instead, Home Depot explicitly defined the parties as Home Depot and Mr. Jackson. Home Depot's merger clause unambiguously states that its 13-page contract is the "entire understanding" between Home Depot and Mr. Jackson. Home Depot's merger clause expressly states that the 13-page agreement "supersedes all prior written or verbal agreements made by Home Depot, Installation Professional, You [Mr. Jackson], or **anyone else.**"

(emphasis added) Moreover, Home Depot was a not a party to the CWS contract.

Where Home Depot's contract with Mr. Jackson contains no arbitration provision, there is not only no reason to refer Jackson's claims against Home Depot to arbitration, there is no good faith basis for filing the instant motion. Neither Citibank nor CWS's arbitration provisions save Home Depot, or provide a good faith basis for the motion to refer the claims against Home Depot, arising from its Home Improvement Agreement, to arbitration. Home Depot's position on this critical issue can be effectively characterized as silence. Other than nakedly averring in a conclusory fashion that the claims don't distinguish between Home Depot and CWS, Home Depot makes no showing or argument as to why it may avail itself of another party's arbitration provision in a contract to which it is not a party. And, unlike the extremely broad Citibank arbitration clause, which expressly brings within its ambit "anyone connected with [Citibank]," the CWS arbitration provision only covers disputes between the "parties" to the CWS contract, who are the "Buyer" (Mr. Jackson) and the "Seller" (CWS). As Home Depot itself notes, "When the language of the arbitration clause is 'clear and unambiguous,' [North Carolina courts] apply the plain meaning rule to interpret its scope." *Fontana v. Southeast Anesthesiology Consultants, P.A.*, 729 S.E.2d 80, 86 (N.C. App. 2012) (citation omitted). The CWS arbitration clause is clear and unambiguous in that it only covers the "parties" – Mr. Jackson and CWS. In the absence of any arbitration clause in the Home Depot Home Improvement Agreement contract, and where Home Depot acted

with intention to not incorporate the CWS arbitration clause, the Court must deny the motion to dismiss.

3. The Citibank arbitration clause is not in this case.

A shorthand summary of the Amended Complaint is that the document takes Citibank out of the case entirely. Citibank already dismissed its first-party claims against Plaintiff. Now, Plaintiff has done away with its Holder Rule claim against Citibank. There is no reference to Citibank or the financing obtained through Citibank in the Amended Complaint.

Along with eliminating Citibank as a party, Plaintiff also removed Citibank's Cardholder Agreement entirely from the case. The Citibank financing agreement, as embodied in the Cardholder Agreement, was always ancillary to Plaintiff's primary claims of violating the North Carolina Referral Sales Statute and North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), the violations of which exist without reference to how Plaintiff financed the transaction. If Plaintiff had paid cash for the water treatment system, and there was no financing at all, Home Depot still would be in violation of both the Referral Sales Statute and UDTPA. All claims of an illegal referral scheme relate to conduct that occurred prior to the financing, and Citibank was not involved. The Referral Sales Statute and UDTPA claims were always asserted against Home Depot and CWS only – Citibank was never charged with violation of these North Carolina statutes. Just like any other purchase made on a credit card, the arbitration clause contained therein only applies to claims involving the financing and not to the underlying purchases.

Despite making some minor changes to its Motion to Dismiss to address the effects of the Amended Complaint, Home Depot's invocation of the Citibank arbitration provision is still based entirely upon paragraphs of the original Complaint, paragraphs that have been removed from the Amended Complaint. There is no allegation about financing (former ¶ 18 and ¶ 24), no allegation about rates of interest (former ¶ 18 and ¶ 28), and no allegation that claims against Citibank are interrelated (former ¶ 75) in the Amended Complaint, which is now indisputably the operative complaint in this case. Yet inexplicably, and in a patent attempt to bootstrap into the Citibank arbitration provision, Home Depot still cites those very paragraphs in its motion to dismiss. See Home Depot's Motion to Dismiss at Pages 12-13. Despite the fact that the word "Citibank" does not even appear in the Amended Complaint, Home Depot continues to predicate its argument that it may avail itself of the Citibank arbitration clause. Home Depot may not piggyback on Citibank when all claims by and against Citibank have been dismissed from this case.

Home Depot makes a number of unsupported and erroneous statements about the relief that Third-Party Plaintiff is seeking in an attempt to pull the Citibank Agreement back into this litigation. Home Depot asserts, without any citation or attribution, that "Mr. Jackson seeks to void the Card Agreement, invalidate the accompanying debt to Citibank, and compel Home Depot to compensate Mr. Jackson for the payments he made on his Citibank account." Home Depot's Motion to Dismiss at Page 2. None of this is true, and none of this can be found in the Amended Complaint. Nowhere in the operative Complaint is there any claim that Mr.

Jackson seeks to "void the Card Agreement." Home Depot can't point to any part of the Amended Complaint where Mr. Jackson seeks this relief, because it isn't anywhere in the operative complaint. Instead, the Amended Complaint plainly asserts that the North Carolina Referral Statute makes the entire purchase contract void and a nullity. The fact that Home Depot may have to pay to put Plaintiff and the class back in the position they were in before they entered into the referral contract does not equate to triggering Citibank liability. At the conclusion of this lawsuit, it may very well be the case that Mr. Jackson still has an open Home Depot credit card account serviced by Citibank. Second, it is equally false for Home Depot to assert that Mr. Jackson seeks to "invalidate the accompanying debt to Citibank" and to "compel Home Depot to compensate Mr. Jackson for the payments he made on his Citibank account." Again, neither of these claims exist in the operative Amended Complaint. This lawsuit simply doesn't seek a direct invalidation of any alleged debt to Citibank, nor does it seek any restitution from Citibank. The claims that exist only exist between Plaintiff, Home Depot, and Carolina Water Systems. While the relief actually sought by the plain and unambiguous language of the Amended Complaint might ultimately have that practical effect, it would only be as a result of a multistep process of unwinding this unfair, deceptive, and illegal referral sales scheme. First, if Mr. Jackson was successful on his claims in this lawsuit, the entire sales contract between Mr. Jackson and Home Depot would be deemed a nullity. Second, if the sales contract was deemed a nullity, the remedy would be to put the parties to that contract (Mr. Jackson and Home Depot) back in the positions they were in prior to the contract. This would

have the practical effect of cancelling the underlying obligation and returning the water equipment. It would also have the effect of obligating Home Depot, not Citibank, to make restitution to Mr. Jackson. Regardless, the relief sought in this lawsuit could neither directly invalidate any alleged debt to Citibank, nor would it empower Mr. Jackson to obtain restitution from Citibank for payments made on the credit card account. Simply stated, when Citibank dropped its claims against Jackson and Jackson dropped his claim against Citibank, the Cardholder Agreement and its corresponding arbitration clause also dropped from this case.

Desperate to avoid liability in open court, Home Depot also makes the rather astonishing allegation that "Citibank is jointly and severally liable to Jackson" as a result of its financing agreement. Home Depot's Motion to Dismiss at Page 13. This is entirely pretextual, and a patent attempt to cling on to an arbitration provision that is unequivocally not in this case. If Home Depot's allegation of joint and several liability is anything less than wholly disingenuous, surely Home Depot will be filing its own third-party complaint against Citibank at any time. The Court should not hold its breath waiting for that to occur.

Home Depot is correct in stating that "Mr. Jackson's decision to withdraw his claims against Citibank does not sever the relationship between his claims against Home Depot and his Citibank Account." *Id.* But that is because there was no need to sever those claims in the first place – the claims were always entirely separate, as the Referral Sales Act and UDTPA claims were asserted against Home Depot and CWS only, and the Holder Rule claim was asserted against

Citibank only and in defense to Citibank's allegations. The various claims were all based upon multiple contracts, none of which are integrated with one another. The plain language of Home Depot's own contract (its Home Improvement Agreement) states that the Citibank Cardholder Agreement is separate in at least 3 places:

> **"Your separate cardholder agreement (to which Home Depot is NOT a party) . . ."**

See Exhibit A to First Amended Third-Party Complaint, Pages 3 of 13 and 4 of 13. There is no allegation in the Amended Complaint that there is any interrelation between the Citibank Cardholder Agreement and the Home Depot Home Improvement Agreement. The financing is entirely separate from the purchase, and the two are not dependent upon one another. Mr. Jackson could have paid cash, or used a home equity loan, or could have borrowed money from a friend. The Citibank financing is incidental to and separate from the sales contract. For example, if a dry cleaner damages a suit and the customer sues for damages, the fact that customer paid by credit card does not give the dry cleaner the ability to trigger the arbitration clause in the Cardholder Agreement. As here, the arbitration clause in the Cardholder Agreement is only an agreement to arbitrate disputes between the bank and the debtor. Here, Home Depot is in the same shoes as the dry cleaner and has no ability to hide behind Citibank's Cardholder Agreement. Once Citibank and Mr. Jackson dropped claims against one another, that Cardholder Agreement, and its arbitration clause, no longer apply.

To the extent that Home Depot's motion relies upon the Citibank arbitration clause as the basis for

referral to arbitration and subsequent dismissal, all those parts of Home Depot's motion are moot as a result of the filing of the Amended Complaint.

4. Under North Carolina law, Home Depot's entire sales contract is a nullity, and there is therefore no arbitration clause to enforce.

Even if Home Depot could somehow establish that it is covered by the CWS arbitration clause, both sales contracts (CWS and Home Depot) are void and a nullity under North Carolina law. Therefore, there is no agreement at all and certainly no agreement to arbitrate. he Amended Complaint sets out with particularity an allegation that Home Depot violated North Carolina's Referral Sales Statute, N.C.G.S § 25A-37. In support of this allegation, Third-Party Plaintiff attached the Home Depot Home Improvement Agreement to the Amended Complaint as Exhibit A. The first page of Exhibit A states on its face: "6 referrals purchase gets his system free."

"North Carolina's Referral Sales Statute specifically prohibits this conduct and nullifies all contracts that include referral programs:

> The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful. **Any obligation of a buyer arising under such a sale shall be**

> **void and a nullity** and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale.

G.S. § 25A-37 (emphasis added).

For purposes of a motion to dismiss, the court construes plaintiff's allegations in the light most favorable to plaintiff, and all well-pleaded allegations of the complaint are accepted as true:

> In evaluating motions to dismiss, the court must construe the complaint's factual allegations "in the light most favorable to the plaintiff" and "must accept as true all well-pleaded allegations." *Randall v. U.S.*, 30 F.3d 518, 522 (4th Cir.1994).

Johnson v. N. Carolina, 905 F. Supp. 2d 712, 718 (W.D.N.C. 2012). But this case goes even further than that – here, there is no fact in controversy that Home Depot's sales contract (aka the Home Improvement Agreement) violates G.S. § 25A-37, where the contract on its face shows the illegal referral scheme, rendering this sales contract a nullity under N.C. law.

A "nullity" is distinguishable from contracts that are merely "void" or "voidable." In a wide variety of judicial contexts, in North Carolina courts and in courts across the country, a "nullity" means that the entire contract never existed. "A nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exceptions." *Carpenter v. Carpenter*, 93 S.E.2d 617, 632, 244 N.C. 286, 304 (N.C. 1956) (quoting *City of Monroe v. Niven*, 221 N.C. 362, 20 S.E.2d 311, 312 (N.C. 1942). "A void contract is no

contract at all; it binds no one and is a mere nullity." *Primerica Life Ins. Co. v. James Massengill & Sons Const. Co.*, 712 S.E.2d 670, 679, 211 N.C.App. 252, 263 (N.C.App.,2011) (quoting *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968)).[1]

In *Carpenter, supra*, the North Carolina Supreme Court gave a primer on nullity:

> It is well established law that a void judgment is no judgment, is a nullity without life or force, no rights can be based thereon, and it can be attacked collaterally by any one whose rights are adversely affected by it. *Reid v. Bristol*, 241 N.C. 699, 86 S.E.2d 417; *304 *Casey v. Barker*, 219 N.C. 465, 14 S.E.2d 429; *Dunn v. Wilson*, 210 N.C. 493, 187 S.E. 802. . . .
>
> In *City of Monroe v. Niven*, 221 N.C. 362, 20 S.E.2d 311, 312, Barnhill, J., (now C. J.) said for the Court: A void judgment may 'be disregarded and treated as a nullity everywhere. It is *coram non judice*.' Further on in the opinion it is said: "A nullity is a nullity, and out of nothing nothing comes.' * * * ' The passage of time, however great, does not affect the validity of a judgment; it cannot render a void judgment valid."
>
> Stacy, C. J., said for the Court in *Harrell v. Welstead*, 206 N.C. 817, 175 S.E. 283; "But a

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[1] An apt analogy to the distinction between void and a nullity would be the difference between divorce and annulment. A divorce voids a marriage contract, while an annulment renders it a nullity, having never existed.

> void judgment is no judgment, and may always be treated as a nullity.'

Carpenter, 244 N.C. at 303-04, 93 S.E.2d at 632. In *Laurel Valley Watch, Inc. v. Mountain Enterprises of Wolf Ridge, LLC*, 192 N.C.App. 391, 665 S.E.2d 561 (2008), the court wrote: "Furthermore, a universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Id.* at 404, 665 S.E.2d at 570. The central point of all of these cases is that a contract that is a "nullity" is one that never existed, as opposed to being a contract that existed but is unenforceable or "void."

Courts in other jurisdictions have echoed this concept of nullity meaning "never existed." In *Davis v. Parker*, 58 F.3d 183 (5th Cir. 1995), the Fifth Circuit wrote:

> The most prominent feature of an action for nullity is the relief it permits: the contract is declared null and deemed never to have existed.

Davis, 58 F.3d at 190. In Virginia, federal courts have stated that legal nullity means that there is no valid instrument, with no legal force or effect.

> However, [plaintiff] Meth does not dispute that a document, once struck, has no legal force or effect. See *Moore v. COSI, Inc.*, No. 1:11–cv–1393 (GBL/TCB), 2012 WL 1410052, at *2-3 (E.D.Va. Apr. 20, 2012) (finding under Virginia law that a Complaint was a legal nullity and could not be amended because amendment presupposes a valid instrument). As such, a notice of consent to sue that is a legal nullity cannot have tolled the statute of

> limitations. See *Ozbay v. Eli Lilly & Co.*, No. 1:08CV227 (LMB/TCB), 2008 WL 895776, at *2-3 (E.D.Va. Apr. 2, 2008) (finding that a motion for judgment that was a legal nullity could not toll the statute of limitations period).

Meth v. Natus Medical Inc., 2014 WL 3544989, at *3 (E.D.Va.,2014).

In Louisiana, courts rely upon the Louisiana Civil Code to establish the principles that an absolutely null contract is treated as if it were never made, and the parties are restored to the positions they were in before the contract was entered into:

> In Louisiana, lawful cause is a required element for formation of a valid contract. La. Civ.Code art.1966. A contract that lacks lawful cause is an absolute nullity, meaning that it cannot be confirmed by the parties. La. Civ.Code arts. 29, 30. An absolutely null contract is treated as if it were never made, and the parties are restored to the positions they occupied before the contract. La. Civ.Code art.2033. Cause is defined as "the reason why a party obligates himself." La. Civ.Code art.1967. The cause of an obligation is unlawful when enforcement of the obligation would result in a violation of a law or public policy. La. Civ.Code art.1968.

Lowery v. Divorce Source, Inc., 2015 WL 5321758, at *2 (E.D.La.,2015). The plain and ordinary meaning of "nullity" is "never existed."

Basic principles of statutory construction dictate that "nullity" in the North Carolina Referral Sales

Statute be given its plain and ordinary meaning, to ensure that the legislative intent is accomplished:

> As our Supreme Court has emphasized, when construing a statute, "our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). In performing this function, "[l]egislative purpose is first ascertained from the plain words of the statute." Id. See also *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267-68, 624 S.E.2d 345, 348 (2006) ("The first consideration in determining legislative intent is the words chosen by the legislature."). When the words are unambiguous, "they are to be given their plain and ordinary meanings." *Id.* at 268, 624 S.E.2d at 348.

State v. Rawls, 207 N.C. App. 415, 419, 700 S.E.2d 112, 115 (2010).

The distinction between a claim that a contract is "void" versus one that is a "nullity" is a critical one for purposes of determining whether this Court or an arbitrator should consider Mr. Jackson's challenge to the sales contract, including its arbitration clause. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449, 126 S. Ct. 1204, 1210, 163 L. Ed. 2d 1038 (2006), the Court held that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye*, 546 U.S. at 449, 126 S. Ct. at 1210. The Supreme Court found that since an arbitration provision was severable from the remainder of the contract, challenges to the entire contract based upon voidness or voidability

were for the arbitrator to consider, and not the courts. *Buckeye*, 546 U.S. at 446.

But, as the Second Circuit found in *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396 (2d Cir. 2009):

> *Buckeye* expressly limited its holding to challenges to a "contract's validity," as distinguished "from the issue whether any agreement between the alleged obligor and obligee was ever concluded," including, as relevant to this appeal, "whether the signor lacked authority to commit the alleged principal." Id. at 444 n. 1, 126 S.Ct. 1204.

Telenor, 584 F.3d at 406.

Here, the contract's validity, or the arbitration clause's severability, are not the issues. Mr. Jackson does not claim that the contract is invalid or unenforceable – his position is that the contract *never existed* at all. There is no "remainder of the contract" to enforce because, unlike the situation in *Buckeye* which only voided portions of an otherwise binding contract, the entire agreement here is a "nullity" which is, by definition, to be treated as it were never made and the parties are restored to the positions occupied before the contract was entered into. Mr. Jackson has provided the Court with evidence of the sales contract's nullity, in the form of the plain language of the Home Depot Home Improvement Agreement itself stating "6 referrals purchase gets his system free." Because there is no contract, and never was, there is no arbitration provision to enforce. Neither *Buckeye* nor its progeny reach a contrary result.

Even if the CWS arbitration clause were found to be enforceable, it cannot and does not apply to Home Depot because Home Depot is not a party to the CWS contract. Also, as shown above, Home Depot intentionally did not include any arbitration clause in its contract. For all these reasons, Home Depot's motion to compel arbitration must be denied.

5. The CWS arbitration clause is void as being procured by fraud by omission, and due to unconscionability.

The only arbitration clause in this case is the CWS arbitration clause, and this clause is the only arbitration clause upon which Home Depot may even potentially make a claim for referral to arbitration. However, the CWS arbitration clause only applies to "parties" to the contract as set forth above, and Home Depot is not a party and therefore cannot enforce the CWS arbitration clause. Even if it were able to do so, the CWS arbitration clause is void because (1) it was procured via fraud by omission, (2) it is both procedurally and substantively unconscionable, and; (3) it provides no basis for referral to arbitration.

The CWS Purchase Agreement arbitration clause reads as follows:

> **5. GOVERNING LAW, ARBITRATION AND FORUM SELECTION:** NOTICE OF ARBITRATION: THIS CONTRACT CONTAINS A BINDING ARGREEMENT TO ARBITRATE ALL CLAIMS, DISPUTES AND CONTROVERSIES ARISING OUR OF OR IN CONNECTION WITH THIS CONTRACT. This Agreement and the parties' performance under it are governed by the laws of the State

> of North Carolina. Any controversy, claim or dispute arising out of or relating to this Agreement shall be submitted to arbitration in Charlotte, North Carolina in accordance with the rules and laws of the State of North Carolina. Judgment upon any award rendered by the arbitrator(s) may be entered in any North Carolina State Court having jurisdiction thereof. Buyer irrevocably consents to and confers personal jurisdiction upon the courts of the State of North Carolina, and waives any objections to the venue of such courts, and agrees that service of process may be made on Buyer by mailing a copy of the summons and complaint by registered or certified mail, receipt requested, to Buyer's address as listed on the Agreement or such other address as Buyer shall hereafter provide in writing. Each party shall be responsible for its share of arbitration fees in accordance with the applicable Rules of Arbitration. In the event a party fails to proceed with arbitration, unsuccessfully challenges the arbitrator's award, or fails to comply with the arbitrator's award, the other party is entitled to costs of suit, including reasonable attorney's fees for having to compel arbitration or defend or enforce the award.

Based upon information and belief and the CWS form contract on its face, this is a boilerplate arbitration clause that CWS inserts into all of its sales contracts.

The Federal Arbitration Act ("FAA") reflects the fundamental principle that arbitration is a matter of contract. *Rent-A-Center, West, Inc. v. Jackson*, 561

U.S. 63, 68 130 S.Ct. 2772 (2010). The U.S. Supreme Court in *Rent-A-Center* went on to discuss the circumstances under which an arbitration clause would be invalidated:

> Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), provides:
>
> > "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.
>
> The FAA thereby places arbitration agreements on an equal footing with other contracts, *Buckeye*, supra, at 443, 126 S.Ct. 1204, and requires courts to enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Like other contracts, however, they may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

Rent-a-Center, 561 U.S. at 68. The U.S. Supreme Court in *Rent-A-Center* went on to hold that challenges to an arbitration clause are matters for the court, not the arbitrator, to consider:

> But that agreements to arbitrate are severable does not mean that they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4. In *Prima Paint*, for example, if the claim had been "fraud in the inducement of the arbitration clause itself," then the court would have considered it. 388 U.S., at 403-404, 87 S.Ct. 1801. "To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract," id., at 404, n. 12, 87 S.Ct. 1801.

Rent-A-Center, 561 U.S. at 71.

The same principle (that the courts will hear direct challenges to an arbitration clause) holds under North Carolina law. If a party claims that a dispute is covered by an agreement to arbitrate but the adverse party denies the existence of an arbitration agreement, the trial court shall determine whether an agreement exists. See N.C.G.S. § 1-567.3 (2001). "The question of whether a dispute is subject to arbitration is an issue for judicial determination." *Raspet v. Buck*, 147 N.C.App. 133, 136, 554 S.E.2d 676, 678 (2001) (citing *AT & T Technologies v. Communications Workers*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). This determination involves a two-step analysis requiring the trial court to "ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.' " *Raspet*, 147

N.C.App. at 136, 554 S.E.2d at 678 (quoting *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir.1990)).

The N.C. Supreme Court laid out the analysis used to determine unconscionability in *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 655 S.E.2d 362 (2008):

> A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability. See *Martin v. Sheffer*, 102 N.C.App. 802, 805, 403 S.E.2d 555, 557 (1991); see also 1 James J. White & Robert S. Summers, Uniform Commercial Code § 4-7, at 315 (5th ed.2006) [hereinafter White & Summers] ("Most courts take a 'balancing approach' to the unconscionability question, and ... seem to require a certain quantum of procedural, plus a certain quantum of substantive, unconscionability.")

Tillman, 362 N.C. at 102, 655 S.E.2d at 370. The *Tillman* court went on to further describe both procedural and substantive unconscionability:

> According to *Rite Color Chemical Co.*, procedural unconscionability involves "bargaining naughtiness" in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power. 105 N.C.App. at 20, 411 S.E.2d at 648. Substantive unconscionability, on the other hand, refers to harsh, one-sided, and oppressive contract terms. *Id.* at 20, 411 S.E.2d at 648-49. Of course, unconscionability is ultimately "a determination to be made in light of a variety of factors not unifiable into a formula." White & Summers, § 4-3, at 296

> (emphasis omitted). Therefore, we note that while the presence of both procedural and substantive problems is necessary for an ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa. See *Tacoma Boatbuilding Co. v. Delta Fishing Co.*, 28 U.C.C. Rep. Serv. (CBC) 26, 37 n. 20 (W.D.Wash.1980) ("[T]he substantive/procedural analysis is more of a sliding scale than a true dichotomy. The harsher the clause, the less 'bargaining naughtiness' that is required to establish unconscionability.").

Id. at 102-03, 655 S.E.2d at 370.

In order show procedural unconscionability, Mr. Jackson avers that the bargaining power between defendants and himself was unquestionably unequal, in that Mr. Jackson is a relatively unsophisticated consumer contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their sales contracts. Mr. Jackson also avers that, based upon his own experience and his understanding of the standard practices of the CWS sales representatives, consumers like Mr. Jackson and all others similarly situated are induced to sign the CWS Sales Contract that includes the arbitration clause as part of the high pressure and patently misleading sales pitch in the consumers' homes. There was no mention that the arbitration clause would cover Home Depot, and nothing in the plain language of the form CWS Purchase Agreement that indicates that the arbitration clause would apply to any

parties other than CWS ("Seller") and the consumers ("Buyer"). The subsequent Home Depot Home Improvement Agreement didn't reiterate the arbitration clause, didn't attach it, and didn't incorporate it either expressly or by reference.

The most damning procedural unconscionability was Home Depot's intentional choice to omit the page of the CWS Purchase Agreement that contained the arbitration clause from its Home Improvement Agreement, while at the same time taking another page of that same CWS Purchase Agreement (the cancellation page) and incorporating it right into the Home Depot contract. Home Depot even changed the color of the cancellation page of the CWS Purchase Agreement that it wanted to expressly incorporate to yellow, just to make sure that Mr. Jackson got the message that he couldn't now cancel the sales transaction. Home Depot's intentional conduct in effectively hiding the CWS arbitration clause demonstrates a high level of procedural unconscionability.

As for substantive unconscionability, the CWS arbitration clause does not mention that the consumers like Mr. Jackson are forfeiting their right to trial and a jury. See *King v. Bryant*, 235 N.C. App. 218 at *10, 763 S.E.2d 338, review allowed, 367 N.C. 794, 766 S.E.2d 633 (2014). To the contrary, the CWS agreement references North Carolina courts in multiple places, which could be extremely confusing to laypersons like Mr. Jackson. The CWS arbitration clause expressly states: "Buyer irrevocably consents to and confers personal jurisdiction upon the courts of the State of North Carolina, and waives any objections to the venue of such courts." This could not be more misleading to a lay consumer if it tried to be.

Also, using Mr. Jackson as an example, the putative class members' damages are so low ($1080 in the case of Mr. Jackson) that it is unlikely that any attorneys would be willing to accept the risks attendant to pursuing these claims. These twin factors demonstrate some measure of substantive unconscionability.

These facts lead to the conclusion that the arbitration clause is both procedurally and substantively unconscionable. North Carolina courts have ruled, both before and after *AT & T Mobility v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and *American Express Co. v. Italian Colors Rest.*, 133 U.S. 2304, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013),

> an ultimate finding of unconscionability may be made when the contract presents a pronounced measure of procedural unfairness and only a minimal degree of substantive unfairness or *vice versa*. *Tillman*, 362 N.C. at 103, 655 S.E.2d at 370; *Torrence [v. Nationwide Budget Finance]*, 232 N.C.App. 306, 315, 753 S.E.2d 802, 807 (2014). Numerically speaking, a contract may be considered unconscionable when it suffers from even 99% procedural unconscionability and only 1% substantive unconscionability or *vice versa*. *See Tillman*, 362 N.C. at 103, 655 S.E.2d at 370; *Torrence*, 232 N.C.App. at 103, 753 S.E.2d at 807.

King, 235 N.C. App. 218 at *10. Taken together, the procedural and substantive unconscionability present here compels the Court to refuse to compel arbitration.

Third-Party Plaintiff Jackson also avers that he was fraudulently induced into arbitration, via fraud by

omission. In order to plead fraud by omission under North Carolina law, a plaintiff must allege the following:(1) the relationship or situation giving rise to the duty to speak, (2) the event or events triggering the duty to speak, and/or the general time period over which the relationship arose and the fraudulent conduct occurred, (3) the general content of the information that was withheld and the reason for its materiality, (4) the identity of those under a duty who failed to make such disclosures, (5) what those defendant(s) gained by withholding information, (6) why plaintiff's reliance on the omission was both reasonable and detrimental, and (7) the damages proximately flowing from such reliance. *Suntrust Mortg., Inc. v. Busby*, 651 F. Supp. 2d 472, 484 (W.D.N.C. 2009), quoting *Breeden v. Richmond Community College*, 171 F.R.D. 189, 195 (M.D.N.C.1997) (citations omitted).

Here, the CWS sales representative who came to Mr. Jackson's house on July 24, 2014, and induced Mr. Jackson to sign the CWS sales contract including the arbitration clause, committed fraud by omission. The CWS sales representative, as part of a standard sales pitch given to all prospective purchasers, did not explicitly mention the arbitration provision, read any part of it to Mr. Jackson, or otherwise point it out to Mr. Jackson. Material terms not disclosed, including the waiver of the right to trial by jury, the misleading statements about the jurisdiction and venue of the North Carolina courts, the failure to state that no class action would be allowed, failure to state that Mr. Jackson would not be able to get a lawyer, and the failure to state that while a court proceeding would be paid for by the taxpayers, the costs of arbitration would be borne by Mr. Jackson. The CWS arbitration clause

didn't articulate all the parties that would be potentially covered, nor did it contain a delegation clause regarding who decides issues of arbitrability. This arbitration clause is so misleading, so lacking in specificity, and completely silent as to any material explanation of the extremely broad scope of arbitration that Mr. Jackson was "agreeing" to as to constitute fraud by omission. This provides an independent basis for denying the instant motion.

CONCLUSION

For all of the foregoing reason, the Court should deny Home Depot's motion.

Dated: December 14, 2016

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 3:16-cv-00712-GCM

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

GEORGE W. JACKSON,
Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

HOME DEPOT U.S.A., INC.'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS

* * *

INTRODUCTION

This case began in state court when Citibank, N.A. ("Citibank") attempted to collect payment for a water treatment system purchased by Mr. Jackson using a Home Depot Consumer Credit Card issued by Citibank. In response, Mr. Jackson asserted a counterclaim against Citibank and filed class action claims against Home Depot U.S.A., Inc. ("Home Depot") and Carolina Water Systems, Inc. ("CWS"). *See* Doc. No. 1-1. Citibank then voluntarily dismissed its claim against Mr. Jackson. Home Depot later timely removed the case to this Court under the Class Action Fairness Act of 2005 ("CAFA").

Because the agreement governing Mr. Jackson's Citibank account (the "Card Agreement") and the agreement governing Mr. Jackson's purchase of the water treatment system from CWS (the "Purchase Agreement") require arbitration of any disputes arising under or relating to the agreements, Citibank, Home Depot, and CWS moved to compel arbitration of the claims asserted in the Complaint and dismiss this lawsuit. Doc. Nos. 11-13, 16-18. Shortly thereafter, recognizing the breadth of the Citibank arbitration agreement, and attempting to avoid its effect, Mr. Jackson amended the Complaint to eliminate any claims against Citibank, while leaving his claims against Home Depot and CWS substantially unchanged (the "Amended Complaint"). Doc. No. 30. After Mr. Jackson dropped Citibank from this case, Home Depot and CWS renewed their motions to dismiss in favor of arbitration (together, the "Arbitration Motions"). Doc. Nos. 31-33.

Mr. Jackson makes three principal arguments in response to Home Depot's motion to dismiss in favor of arbitration: (1) the Court must decide Mr. Jackson's pending motion to remand (the "Remand Motion") (Doc. No. 23) before considering the Arbitration Motions; (2) Mr. Jackson has nullified his agreement to arbitrate disputes arising under the Card Agreement by withdrawing his claims against Citibank; and (3) Home Depot cannot rely on the arbitration provision of the CWS Purchase Agreement because, among other things, Home Depot was not a party to the agreement and the agreement is purportedly a "nullity" and unenforceable. All of these arguments fail.

First, the Supreme Court has established that courts have discretion to "choose among threshold

grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citations and quotations omitted). This Court should exercise its discretion to dismiss the case in favor of arbitration rather than reach the Remand Motion, the latter of which involves Mr. Jackson's request for jurisdictional discovery and potentially complex issues of statutory interpretation. Deciding the threshold arbitration issue will serve the interests of judicial economy because the merits of this case should be decided by an arbitrator, not by any court.

Second, Home Depot has the right to enforce the Citibank arbitration agreement as a third party beneficiary because the agreement expressly requires arbitration of claims "against anyone connected with" Citibank. Mr. Jackson's opposition brief relies on a counterfactual argument that assumes Citibank never had anything to with this case, but Mr. Jackson's withdrawal of his claims against Citibank did not change the fact that Mr. Jackson's claims against Home Depot relate to the Card Agreement governing the credit card he used to finance his purchase of the water treatment system.

Third, Mr. Jackson's challenges to the CWS Purchase Agreement are either irrelevant, must be decided by an arbitrator, or are unsupported by evidence. Mr. Jackson's argument that Home Depot is not a party to the Purchase Agreement is irrelevant because Home Depot has the right to enforce the CWS arbitration agreement as a third party given that Mr. Jackson alleges that Home Depot and CWS engaged in interdependent and concerted misconduct. Mr. Jackson's attempt to avoid his agreement with CWS by arguing

that it violates the North Carolina referral sales statute assumes that Mr. Jackson has already prevailed and is contrary to Supreme Court precedent that a challenge to the validity of a contract as a whole is for the arbitrator, not a court, to decide. Finally, Mr. Jackson's arguments that the arbitration provision in the Purchase agreement is unconscionable and was procured by fraud must be supported by evidence at this stage and he has produced none. In any event, they lack merit.

For these reasons, the Court should exercise its discretion to dismiss this case in favor of arbitration.

ARGUMENT

I. THIS COURT SHOULD DISMISS THIS ACTION IN FAVOR OF ARBITRATION BEFORE ADDRESSING REMAND.

This Court should address the threshold grounds for dismissal that Home Depot and CWS have raised in their Arbitration Motions before the Court addresses the Remand Motion, because the arbitration issue is logically antecedent to subject matter jurisdiction and because doing so will serve the interests of judicial economy.

The Supreme Court has held that courts should "bypass[ ] questions of subject-matter and personal jurisdiction" ***either*** (1) when a party has raised threshold non-merits questions that are "logically antecedent" to jurisdiction, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (addressing class certification before jurisdiction because certification was "'logically antecedent' to Article III concerns") (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997)), ***or*** (2) when "considerations of convenience, fairness,

and judicial economy so warrant," *Sinochem*, 549 U.S. at 432.[1] Both grounds support deciding the Arbitration Motions before the Remand Motion here.

First, arbitrability is a "threshold matter[ ]," *Tribal Casino Gaming Enter. v. W.G. Yates & Sons Constr. Co.*, No. 1:16-CV-00030-MR-DLH, 2016 WL 3583813, at *3 (W.D.N.C. July 1, 2016), and contrary to Mr. Jackson's argument that the Arbitration Motions are "dispositive motions" involving the adjudication of "substantive issues," Doc. 35 at 5, "motions to stay litigation and compel related arbitration are non-dispositive motions" under the Federal Rules. *PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 14 (1st Cir. 2010); *see also Herko v. Metropolitan Life Ins. Co.*, 978 F. Supp. 141, 142 n.1 (W.D.N.Y. 1997) ("The court has considered whether a motion to compel arbitration is a dispositive motion and has concluded it is not."). An arbitration motion "is not dispositive of either the case or any claim or defense within it." *PowerShare*, 597 F.3d at 14. Rather, granting an arbitration motion merely means that the case must be heard in a different forum. As such, an arbitration agreement "is, in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Thus, a dismissal in favor of arbitration is not a judgment on the merits. As in *Sinochem*, "it is a determination that the merits should be adjudicated elsewhere." 549 U.S. at 432.

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[1] These principles apply in removed cases. *See Ruhrgas v. Marathon Oil*, 526 U.S. 574, 578 (1999) ("We hold that in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy.").

Second, deciding the Arbitration Motions before the Remand Motion will serve the interests of convenience and judicial economy. Following *Sinochem*'s instruction that a court has discretion to "choose among threshold grounds for denying audience to a case on the merits," *Sinochem*, 549 U.S. at 431 (citation and quotations omitted), numerous courts have compelled arbitration or entered some other form of dismissal "immediately" to promote convenience and judicial economy. *See Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 457 (S.D.N.Y. 2008) (courts are "entitled to dismiss an action more conveniently litigated elsewhere 'immediately'" without going through difficult and costly discovery to determine jurisdiction); *Ramasamy v. Essar Global Ltd.*, 825 F. Supp. 2d 466, 467 n.1 (S.D.N.Y. 2011) ("[b]ecause the Court has determined the case should be dismissed in favor of arbitration, it does not reach defendant's motion to dismiss for lack of personal jurisdiction..."); *Magi XXI, Inc. v. Stato della Città del Vaticano*, 818 F. Supp. 2d 597, 621 (E.D.N.Y. 2011), *aff'd*, 714 F.3d 714 (2d Cir. 2013) (bypassing issues of jurisdiction in order to decide arguments regarding forum selection clauses in the parties' contracts, holding "[p]rinciples of judicial economy dictate that the Court should avoid, if possible, the delays associated with discovery"); *Burnham Enter., LLC v. DACC Co. Ltd.*, No. 2:12-CV-111-WKW, 2013 WL 68923, at *1 n.2 (M.D. Ala. Jan. 7, 2013) ("Because the motions to compel arbitration dispose of the matter at this juncture, this opinion will not address the arguments raised in the motions to dismiss, which include challenges to personal jurisdiction").

Here, Mr. Jackson has already served two sets of jurisdictional discovery in connection with the Remand

Motion, and resolution of that motion will require this Court to decide several legal and factual issues. *See* Exhibit C (Requests for Production and Interrogatories attached). By contrast, as discussed below, although Mr. Jackson has raised several purported challenges to the Citibank Card Agreement and the CWS Purchase Agreement, those challenges should be decided by the arbitrator under settled law.

Because the issues raised in the Arbitration Motions are both logically antecedent to and more efficient to consider before subject matter jurisdiction, this Court has discretion to dismiss this case based on the arbitrability of the dispute rather than address Mr. Jackson's Remand Motion. *See In re Residential Capital, LLC*, No. 12-12020, 2016 WL 6155925, at *1 (Bkrtcy. S.D.N.Y. Oct. 21, 2016) (granting arbitration motion and dismissing motions on personal and subject matter jurisdiction as moot). "[I]t is appropriate to address the [a]rbitration [m]otions as the threshold matter because resolution of those motions will moot" the Remand Motion. *Id.* at *5; *see also In re LimitNone, LLC*, 551 F.3d 572, 577-78 (7th Cir. 2008) (affirming transfer based on forum selection clause before deciding remand motion); *Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865, 869 (9th Cir. 1991) (affirming dismissal of removed action where lower court granted motion to dismiss for improper venue based on forum selection clause and therefore denied remand motion); *Koresko v. RealNetworks, Inc.*, 291 F. Supp. 2d 1157, 1162-63 (E.D. Cal. 2003) (where competing motions to dismiss and remand were pending, dismissing case for improper venue based on forum selection clause and therefore denying remand).

Mr. Jackson cites several cases for the proposition that remand should be decided first, but *none* of these cases address *Sinochem*. Four of these cases predate *Sinochem*. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 34, (1983); *TC Arrowpoint, L.P. v. Choate Const. Co.*, No. 3:05CV267-H, 2005 WL 2148934, at *1 (W.D.N.C. Sept. 7, 2005); *Terrell Indep. Sch. Dist. v. Benesight, Inc.*, No. CIV.A. 301CV1834G, 2001 WL 1636418, at *5 (N.D. Tex. Dec. 18, 2001); *Acosta v. Norwegian Cruise Line, Ltd.*, 303 F. Supp. 2d 1327, 1331 (S.D. Fla. 2003). The post-*Sinochem* cases Mr. Jackson cites similarly do not discuss the court's discretion to choose among threshold grounds to deny audience to a case on the merits, and fail to consider *Sinochem* at all. *See Socoloff v. LRN Corp.*, No. CV 13-4910-CAS AGRx, 2013 WL 4479010, at *2 (C.D. Cal. Aug. 19, 2013); *Niami v. Fed. Exp. Print Servs., Inc.*, No. C 09-4384 JF, 2010 WL 958045, at *7 (N.D. Cal. Mar. 12, 2010); *Liberty Nw. Ins. Co. v. Certain Underwriters at Lloyd's*, No. 15-CV-02334-WHO, 2015 WL 5012758, at *1 (N.D. Cal. Aug. 24, 2015) (citing *Niami*); *Diego v. Golden Valley Health Centers*, No. 1:15-CV-00085-JAM, 2015 WL 4112276, at *3 (E.D. Cal. July 8, 2015).

Under *Sinochem*, this Court has the authority and the discretion to resolve the threshold issue of arbitrability now and send the case to arbitration before engaging in the more complex jurisdictional inquiry that Mr. Jackson's Remand Motion would require. Deciding the arbitration issue first also promotes judicial economy because remanding the case to state court merely postpones the arbitration decision by forcing another court to make it.

II. AMENDING THE COMPLAINT DID NOT TAKE THE CITIBANK ARBITRATION PROVISION OUT OF THIS CASE.

Mr. Jackson argues that he can avoid his obligation to arbitrate disputes under his Citibank Card Agreement because he dropped his claims against Citibank and excised any mention of Citibank from his Amended Complaint. Because the Amended Complaint, unlike the original Complaint, now contains "no reference to Citibank or the financing obtained through Citibank," Mr. Jackson argues that the Card Agreement has been removed from the case. Doc. 35 at 10. Such procedural gamesmanship,[2] however, does not nullify the existence of the Card Agreement or its arbitration provisions, and it does not change the fact that Mr. Jackson purchased his water treatment system using a credit card subject to the Card Agreement. *See Macko v. Disaster Masters, Inc.*, No. 1:10CV424,

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[2] Despite the arguments in Mr. Jackson's opposition (Doc. 27) to Home Depot's motion to realign the parties (Doc. 14) and his Remand Motion, Mr. Jackson's dismissal of Citibank confirms that the primary purpose of this litigation is the pursuit of his claims against Home Depot and CWS and that Home Depot and CWS are the defendants in this case. In fact, Mr. Jackson consistently refers to himself as "Plaintiff" throughout his opposition brief. By filing the Amended Complaint, Mr. Jackson is attempting to have his cake and eat it too. He has opportunistically brought a class action in state court under a supposed loophole to CAFA preventing Home Depot (as a non-original defendant) from exercising its right to remove. Mr. Jackson was only able to do that by bringing Home Depot into the case as a third party to Citibank's lawsuit. But now Mr. Jackson would like to pretend that Citibank has nothing to do with this case to avoid the effect of the arbitration provisions of the Card Agreement. He should not be permitted to do so.

2011 WL 1458504, at *3 (M.D.N.C. Apr. 15, 2011) (parties may amend pleadings, but "disavowed portions of an original pleading may remain relevant to the proceedings"). Even after amendment, statements made in the prior pleading "are not rendered inadmissible, and may be considered by this Court." *Cananwill, Inc. v. EMAR Grp., Inc.*, 250 B.R. 533, 545 (M.D.N.C. 1999) ("This determination is consistent with the view that '[a] party ... cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories.'") (alteration in original; italics excluded) (quoting *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984)).

Ignoring Citibank's role in this dispute, Mr. Jackson's argument relies on a counterfactual — that if he had paid cash for the water treatment system, or used a home equity loan, or borrowed money from a friend, Citibank would never have been involved. Doc. 35 at 11, 14. But that is not what happened. Mr. Jackson paid for his water treatment system using a credit card subject to the Card Agreement and defaulted on his obligations under the agreement. When Citibank sought to remedy Mr. Jackson's breach, Mr. Jackson brought Home Depot and CWS into the case to avoid having to pay Citibank. Thus, this controversy arose from and relates to a dispute between Mr. Jackson and Citibank under the Card Agreement. Amending his pleading to drop any mention of Citibank does not change any of those facts.

Moreover, contrary to the argument in Mr. Jackson's brief that "[n]owhere in the operative Complaint

is there any claim that Mr. Jackson seeks to 'void the Card Agreement,'" Doc. 35 at 12, as explained in Home Depot's motion, Mr. Jackson alleges in the Amended Complaint that "all contracts between Jackson and HOME DEPOT, CWS, or others having anything to do with the water treatment systems at issue" are "'void and a nullity.'" Am. Compl. ¶ 6. Indeed, Mr. Jackson acknowledges that he still has "an open Home Depot credit card account serviced by Citibank," and concedes that if he were to prevail in this case, it would have the "practical effect" of invalidating his debt to Citibank. Doc. 35 at 12-13. Mr. Jackson's related argument that "Home Depot's allegation of joint and several liability" with Citibank is "entirely pretextual" and "wholly disingenuous," Doc. 35 at 13, ignores the fact that the allegation of joint and several liability with Citibank is not Home Depot's invention. Rather, it was a direct quote from Mr. Jackson's prior complaint. *See* Doc. 33 at 12-13 (quoting Compl. ¶ 75, which alleged that "Citibank is subject to all claims and defenses that Jackson has against Home Depot and CWS" and that "Citibank is jointly and severally liable to Jackson"). Evaluating Home Depot's motion based on Mr. Jackson's allegations demonstrates that the remaining claims in this action still "relate to" the Card Agreement.

In the alternative, Mr. Jackson argues that the arbitration agreement only applies to disputes between the bank and the debtor. Doc. 35 at 14. The plain language of the arbitration agreement forecloses that argument: **"Whose Claims are subject to arbitration?** Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you...." Ryning Aff., Ex. 1 [Doc.

13-1]. Mr. Jackson concedes as much when he attempts to distinguish the CWS arbitration agreement from the "extremely broad Citibank arbitration clause, which expressly brings within its ambit 'anyone connected with [Citibank].'" Doc. 35 at 10. Mr. Jackson makes no effort to distinguish the numerous cases cited by Home Depot in its opening brief that third party beneficiaries can enforce arbitration agreements against a signatory. *See* Doc. 33 at 13-14; *Washington Square Sec., Inc. v. Aune*, 253 F. Supp. 2d 839, 844 (W.D.N.C. 2003), *aff'd*, 385 F.3d 432 (4th Cir. 2004) (holding that third party beneficiaries could enforce arbitration provision). Nor can Mr. Jackson deny the connection between Home Depot and Citibank, given that his purchase of the water treatment system was made using a Home Depot credit card serviced by Citibank.

Finally, Mr. Jackson has no response to Home Depot's argument that the arbitrability of this dispute is itself subject to determination by an arbitrator. Under the plain terms of the arbitration agreement, "Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision" are subject to arbitration. Ryning Aff., Ex. 1 [Doc. 13-1]. Thus, to the extent there is any doubt whether the arbitration provisions of the Card Agreement apply here (and there is none), such doubt must be resolved by an arbitrator. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) ("parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy).

III. HOME DEPOT MAY ENFORCE THE CWS ARBITRATION AGREEMENT AS A NON-SIGNATORY.

A. The Home Improvement Agreement Is Not At Issue On This Motion.

Mr. Jackson argues that because the Home Improvement Agreement ("HIA") between Home Depot and Mr. Jackson does not independently contain a separate arbitration clause, it somehow relieves him of his obligation to arbitrate under the CWS Purchase Agreement. Doc. 35 at 8.[3] That argument is a red herring. Home Depot has never claimed that this case is arbitrable under the HIA.

As an initial matter, Mr. Jackson makes several unsubstantiated arguments about Home Depot having gone "out of its way to *not* include the CWS arbitration provision" in the HIA and "intentionally" not adding the page containing the arbitration clause. Doc. 35 at 9. But Mr. Jackson offers no evidence that Home Depot presented him with the document attached to the Amended Complaint, much less what Home Depot's intent was regarding the document, as he is required to do to support his challenge to the arbitration provision of the CWS Purchase Agreement. Such challenges to the validity of an arbitration agreement are evaluated under a summary judgment standard, such that "the opponent may not rest upon the mere allegations or denials of her pleading but must instead, *by*

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[3] To the extent Mr. Jackson argues that the language of the HIA also precludes Home Depot from relying on the arbitration provisions of the Citibank Card Agreement, that argument is foreclosed by the plain language and broad scope of the Card Agreement, as discussed above.

affidavit or other evidentiary showing, set out specific facts showing a genuine dispute for trial." *Roach v. Navient Solutions, Inc.*, 165 F. Supp. 3d 343, 348 (D. Md. 2015) (emphasis in original). Mr. Jackson's "unsworn *ipse dixit* in [his] opposition memorandum" is nowhere near sufficient to meet his burden. *Id.* at 350.[4]

In any event, these arguments have no bearing on the Arbitration Motions. The HIA is not at issue on this motion, and the purported omission of the CWS arbitration clause does not establish that Home Depot intended that any dispute between it and Mr. Jackson could never be arbitrated, particularly where other parties are involved. Mr. Jackson's attempt to turn "silence" (Doc. 35 at 10) into an affirmative statement that Home Depot opted out of arbitration in all cases is illogical.

Mr. Jackson also argues that the HIA is the only agreement between him and Home Depot, and that it supersedes all prior agreements with CWS. Doc. 35 at 9. That may be true insofar as it concerns the relationship between Home Depot and Mr. Jackson, but that is a separate matter from the relationship between Mr. Jackson and CWS. Put differently, even assuming that the HIA is the only agreement between

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[4] Mr. Jackson cannot even satisfy the pleading standard applicable under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)), or the particularity requirement of Rule 9(b) because the Amended Complaint contains no allegation that Home Depot selectively included only part of the CWS Purchase Agreement in the HIA. "It is well-established that parties cannot amend their complaints through briefing or oral advocacy." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013).

Home Depot and Mr. Jackson, and that it supersedes any other agreements between those two parties, that says nothing about other agreements Mr. Jackson has with CWS. Home Depot is not a party to the CWS contract, but Home Depot does not need to be a signatory to that agreement to enforce it.

B. Home Depot May Enforce The Arbitration Provision Of The CWS Purchase Agreement Against Mr. Jackson.

The Fourth Circuit has held that the determination of whether a nonsignatory is bound by or may enforce a contract is controlled by the federal substantive law of arbitrability. *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 & n.4 (4th Cir. 2000).[5] Under federal law, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Int'l Paper*, 206 F.3d at 416-17 & n.5 (collecting cases as well as "a burgeoning array of secondary authorities"); *see also James C. Greene Co. v. Great American E & S Ins. Co.*, 321 F. Supp. 2d 717, 719 (E.D.N.C. 2004) ("A number of courts, including the Fourth Circuit, have recognized an 'intertwined claims' exception to the general rule"

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[5] The Supreme Court has added that "'traditional principles' of state law" are relevant to the extent there is applicable "state law *permitting* arbitration by or against nonparties to the written arbitration agreement." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 & n.5 (2009) (emphasis in original). In any event, "North Carolina's law of equitable estoppel is the same as Fourth Circuit law." *Klopfer v. Queens Gap Mountain, LLC*, 816 F. Supp. 2d 281, 292 n.5 (W.D.N.C. 2011).

that an arbitration provision only applies to the parties) (citing *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988)); *Sanchez v. Clean-Net USA, Inc.*, 78 F. Supp. 3d 747, 758 (N.D. Ill. 2015) ("courts regularly allow non-signatory entities to enforce an arbitration agreement against a signatory on the basis of equitable estoppel"); *Elkjer v. Scheef & Stone, L.L.P.*, 8 F. Supp. 3d 845, 857 (N.D. Tex. 2014) ("Under certain circumstances, a non-signatory to a contract with an arbitration clause may compel arbitration based on a theory of equitable estoppel as a fairness principle.").

Where a non-signatory seeks to compel arbitration of claims by a plaintiff who is a signatory to such an agreement, it may do so "on the basis of equitable estoppel, so long as two requirements are met: (1) the subject matter of the dispute must be 'intertwined with the contract providing for arbitration'; and (2) there must be a 'relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement.'" *In re Apple iPhone 3G Prods. Liability Litig.*, 859 F. Supp. 2d 1084, 1096 (N.D. Cal. 2012); *see also James C. Greene Co.*, 321 F. Supp. 2d at 720 (holding that non-party to arbitration agreement could enforce arbitration because plaintiff "alleges that defendants collectively engaged in a course of conduct that violated" North Carolina law); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (holding that non-signatory could enforce arbitration agreement when signatory and non-signatory allegedly engaged in

"interdependent and concerted misconduct"). Both of these requirements are met here.

Mr. Jackson argues that his agreement to purchase a water treatment system is void and a nullity and alleges two counts against both Home Depot and CWS. Am. Compl. ¶¶ 48-56 (Count I against both Home Depot and CWS); ¶¶ 57-64 (Count II against both Home Depot and CWS). Thus, the first prong of the equitable estoppel test is met because the subject matter of the dispute, whether Home Depot and CWS violated North Carolina law in connection with the sale of the water treatment system, is intertwined with the Purchase Agreement concerning that sale and containing the arbitration clause, which Mr. Jackson seeks to void. Further, Mr. Jackson's factual allegations make no attempt to distinguish between Home Depot and CWS. *See* Am. Compl. ¶¶ 14-24 ("Home Depot and CWS routinely..."; "Home Depot and CWS would represent..."; "Home Depot and CWS set up appointments..."; "Home Depot and CWS would show up..."; "Home Depot and CWS conducted a few water tests..."; "Home Depot and CWS used..."; "Home Depot and CWS enrolled customers..."). Thus, the second prong of the equitable estoppel test is met because Mr. Jackson alleges that Home Depot and CWS acted together in the alleged violation of law, and he pursues identical counts against both entities. *See Paragon Micro, Inc. v. Bundy*, 22 F. Supp. 3d 880, 890 (N.D. Ill. 2014) (holding that non-signatory could compel arbitration where plaintiff alleged "substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract"); *Elkjer*, 8 F. Supp. 3d at 857 (same).

C. Mr. Jackson's Argument That The Entire Sales Contract Is A Nullity Must Be Heard By An Arbitrator.

Assuming that Home Depot can enforce the CWS arbitration agreement as a non-signatory, Mr. Jackson next argues that the Court should simply ignore the existence of the CWS Purchase Agreement because both it and the HIA "are void and a nullity under North Carolina law." Doc. 35 at 15. This argument puts the cart before the horse, as it assumes that Mr. Jackson has already obtained a ruling that the Referral Sales Statute voids and nullifies the Purchase Agreement.

Not only does this argument assume Mr. Jackson has already prevailed in this litigation, it is one which the Supreme Court expressly rejected in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). In *Buckeye*, the Supreme Court held that when the challenge is to the contract itself, and "not specifically its arbitration provisions," that challenge "should therefore be considered by an arbitrator, not a court." *Id.* at 446. Moreover, the Supreme Court explicitly rejected the argument that its holding should not apply to "an agreement void *ab initio* under state law." *Id.* at 447. Thus, Mr. Jackson's argument that the entire agreement between him, Home Depot, and CWS is a nullity under North Carolina state law must be heard by an arbitrator in the first instance.

Mr. Jackson attempts to distinguish *Buckeye* on the basis that it does not address a situation in which the issue is "whether any agreement between the alleged obligor and obligee was ever concluded." *Buckeye*, 546 U.S. at 444 n.1; see Doc. 35 at 19 (citing *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d

396 (2d Cir. 2009)). Mr. Jackson misreads *Buckeye* and *Telenor*. *Buckeye* explains that the "ever concluded" situation concerns an issue over the formation of the contract, giving as examples whether the obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked mental capacity to assent. *Buckeye*, 546 U.S. at 444 n.1. Likewise, *Telenor* dealt with the issue of whether the alleged agent had authority to commit the alleged principal. *Telenor*, 584 F.3d at 411. In other words, those are *extrinsic* factors that have nothing to do with any provision of the contract itself. Mr. Jackson's argument regarding the allegedly illegal referral sales component, by contrast, is that "the illegality of one of the contract's provisions renders the whole contract invalid." *Buckeye*, 546 U.S. at 444. As the Supreme Court held, this is precisely the type of argument that must be decided by the arbitrator, not the court.

D. Mr. Jackson Has Not Met His Burden To Prove The CWS Arbitration Clause Was Unconscionable And Procured By Fraud.

Mr. Jackson next argues that the arbitration clause in the Purchase Agreement is void because it was procured by fraud by omission, and because of its purported unconscionability. Both arguments fail.

"A court will find a contract to be unconscionable only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the

other." *Klopfer*, 816 F. Supp. 2d at 289 (quoting *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008)). As Mr. Jackson acknowledges, he "must prove both procedural and substantive unconscionability." Doc. 35 at 22 (quoting *Tillman*, 655 S.E.2d at 370). Mr. Jackson "bears the burden of proof for this affirmative defense." *Carson v. LendingTree LLC*, 456 F. App'x 234, 236 (4th Cir. 2011). His conclusory arguments do not meet this burden.

As explained above, disputes about the validity of an arbitration agreement are evaluated under a summary judgment standard, and Mr. Jackson was required "by affidavit or other evidentiary showing [to] set out specific facts" in support of his claim that the arbitration provision in the CWS Purchase Agreement is unconscionable. *Roach*, 165 F. Supp. 3d at 348. The arguments in Mr. Jackson's opposition brief are wholly insufficient to meet this burden, and his claim of unconscionability fails on this ground alone. *See id.* at 350.[6]

Setting aside Mr. Jackson's failure to support his arguments with evidence, those arguments still lack merit. In support of his procedural unconscionability argument, Mr. Jackson contends that the bargaining power between the parties was unequal, that he was pressured into signing the contract, and that his agreement with Home Depot did not include an arbitration clause. Doc. 35 at 23. First, North Carolina courts have held that "bargaining inequality alone

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[6] Here, too, Mr. Jackson cannot even satisfy the pleading standard under Rule 8 because the Amended Complaint is devoid of any allegations concerning the purported unconscionability of the arbitration provision in the CWS Purchase Agreement.

generally cannot establish procedural unconscionability." *Westmoreland v. High Point Healthcare Inc.*, 721 S.E.2d 712, 717 (N.C. App. 2012). Mr. Jackson does not claim that CWS or Home Depot would have refused to sell the water treatment system without an arbitration clause, or that he attempted to bargain over the clause and was refused. Second, Mr. Jackson does not claim that he was not given an opportunity to read the contract, or that he had to purchase the water treatment system immediately. *See Carson*, 456 F. App'x at 236 (no unconscionability where plaintiff did not allege she was "denied any opportunity for a meaningful choice"); *Klopfer*, 816 F. Supp. 2d at 290 (no unconscionability where plaintiff "did not provide evidence as to whether he asked such questions"). Third, Mr. Jackson's argument that there was no express language that the arbitration clause could cover Home Depot is beside the point, given that he chose to bring both Home Depot and CWS into the case together under identical theories of liability. Indeed, it would be nonsensical, and contrary to the strong federal and North Carolina policy favoring arbitration, if a signatory to an arbitration agreement could avoid arbitration by simply including a non-signatory in the lawsuit.

Mr. Jackson's two arguments for substantive unconscionability also fail. He argues that the arbitration clause does not mention the forfeiture of trial by jury, and that the damages are so small it is unlikely attorneys would pursue such claims. Doc. 35 at 24. Mr. Jackson cites only one case for the proposition that an arbitration clause that does not mention the right to trial by jury is substantively unconscionable. In *King v. Bryant*, 763 S.E.2d 338 (Table) (N.C. App. 2014), the

court held that, in a contract between a physician and a patient, the lack of any reference to a right to jury or judge, "when coupled with Defendants' *fiduciary duty*, constitutes *some* evidence of substantive unconscionability." *Id.* at *10 (emphasis added). Here, there is no fiduciary relationship between CWS or Home Depot and Mr. Jackson. Indeed, the *King* court rooted its conclusion "in the limited factual circumstances presented" there. *Id.* at *11. As for Mr. Jackson's argument about the individualized damages available in arbitration, North Carolina courts have held that a class action waiver does not render an arbitration clause unconscionable, and that decisions of the U.S. Supreme Court have articulated the "broader theme that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated." *See, e.g.*, *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802, 811 (N.C. App. 2014); *Knox v. First Southern Cash Advance*, 753 S.E.2d 819, 822 (N.C. App. 2014) (no unconscionability despite class action waiver).[7]

Mr. Jackson's final arguments regarding fraudulent inducement and fraud by omission fare no better. Mr. Jackson recites the seven factors he must prove to establish fraud by omission under North Carolina law, but does not attempt to actually establish any of them with evidence. *See* Doc. 35 at 25 (citing *Suntrust Mortg., Inc. v. Busby*, 651 F. Supp. 2d 472, 484 (W.D.N.C. 2009)). Instead, he merely argues that there was "a standard sales pitch" that did not include an explicit

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[7] Even if North Carolina courts did not recognize the policy favoring arbitration, "the Federal Arbitration Act favors strict enforcement of arbitration provisions and preempts state laws that interfere with arbitration." *Keena v. Groupon, Inc.*, 2016 WL 3450828, at *7 (W.D.N.C. Jun. 21, 2016) (Mullen, J.)

mention of the arbitration provision, and that the CWS sales representative failed to read the arbitration provision to Mr. Jackson. Doc. 35 at 25. Once again, these arguments do not satisfy Mr. Jackson's evidentiary burden. *See Roach*, 165 F. Supp. 3d at 348.[8] Moreover, Mr. Jackson does not even allege the existence of a duty to speak, given that the arbitration clause was included in the short three-page agreement he signed. *See Biesecker v. Biesecker*, 302 S.E.2d 826, 828-29 (N.C. App. 1983) (A "person signing a written instrument is under a duty to read it for his own protection, and ordinarily is charged with knowledge of its contents. Nor may he predicate an action for fraud on his ignorance of the legal effect of its terms.") (citation and quotations omitted). Nor does Mr. Jackson attempt to show how his purported reliance on the lack of an auditory reading of the arbitration clause induced him to sign the agreement. Mr. Jackson's conclusory arguments regarding fraud by omission, just like his unconscionability arguments, do not provide a basis for avoiding arbitration.

CONCLUSION

This Court should exercise its discretion to grant the Arbitration Motions and deny the Remand Motion as moot.

Respectfully submitted this 11th day of January, 2017.

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[8] Like his other arguments concerning the arbitration provision in the CWS Purchase Agreement, these arguments are not based on any allegations in the Amended Complaint, and thus do not pass muster under the pleading standards applicable under Rule 8 and Rule 9(b).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-184
(3:16-cv-00712-GCM)

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

GEORGE W. JACKSON,
Respondent.

January 22, 2018

ORDER

In accordance with the published opinion issued today in Case No. 17-1627, Jackson v. Home Depot U.S.A., Inc., the court grants the petition for permission to appeal.

For the Court

/s/ Patricia S. Connor, Clerk